Supreme Court, U.S.
FILED
021227 FEB - 5 2003
OFFICE OF THE CLERK

No. _____

IN THE
Supreme Court of the United States

JOHN G. STRAND, Chairman;
JOHN C. SHEA, Commissioner; and
DAVID A. SVANDA, Commissioner
(in their official capacities as Commissioners of the
Michigan Public Service Commission),

Petitioners,

v.

VERIZON NORTH, INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

David A. Voges
Steven D. Hughey
Michael A. Nickerson
Assistant Attorneys General
Attorneys for Petitioners

10 2 PP

QUESTION PRESENTED

Whether a negotiated interconnection agreement is the exclusive procedure under the federal Telecommunications Act by which competing local exchange carriers may obtain access, interconnection and services from the incumbent local exchange carrier.

PARTIES TO THE PROCEEDING

Petitioners are John G. Strand, John C. Shea, and David A. Svanda, Commissioners of the Michigan Public Service Commission.

Respondent is Verizon North, Incorporated.

Amicus curiae before the United States Court of Appeals for the Sixth Circuit were AT&T Communications of Michigan, Inc. and MCI Telecommunications Corporation.

TABLE OF CONTENTS

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. Nature of the case 2

B. The Federal Telecommunications Act of 1996 3

C. The Michigan Public Service Commission's orders 5

D. The U.S. District Court Opinion and Order 8

REASONS FOR GRANTING THE PETITION 10

I. In the federal Telecommunications Act, Congress intended to preserve and encourage pro-competitive state regulations 10

II. The Court of Appeals erred when it found the tariff requirement in the MPSC's order to be inconsistent with and preempted by the FTA. 13

A. The Court of Appeals erred when it set aside Michigan's tariffs on the basis that an arbitrated or negotiated interconnection agreement was the exclusive procedure by which CLECs may obtain interconnection. 16

B. The Court of Appeals preemption analysis misapprehends the role performed by State Commissions in the interconnection process and is thus contrary to congressional intent. 21

III. The Circuit Court's decision cannot be reconciled with an opinion from the Tenth Circuit, and if permitted to stand would place CLECs and telecommunications customers within the Sixth Circuit's jurisdiction at a competitive disadvantage 23

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

AT&T Communications of the Southern States, Inc v Bellsouth Telecommunications, Inc,
7 F Supp 2d 661 (ED No Car, 1998)..... 16

Florida Lime & Avocado Growers v Paul,
373 US 132; 83 S Ct 1210; 10 L Ed 2d 248 (1963).... 11, 12

Fort Halifax Packing Co v Coyne,
482 US 1; 107 S Ct 2211; 96 L Ed 2d (1987)..... 11

GTE North, Inc v MPSC, et al,
Mich Ct Apps No. 198324 (unpublished opinion, Dec 30, 1997) 5

GTE North, Inc v Strand,
209 F3d 909 (6th Cir, 2000)..... 1, 8, 24

Hillsborough Co v Automated Medical Laboratories, Inc,
471 US 707; 105 S Ct 2371; 85 L Ed 2d 714 (1985)..... 11

Hines v Davidowitz,
312 US 52; 61 S Ct 399; 85 L Ed 581 (1941)..... 12

Louisiana Public Service Comm v Federal Communications Comm,
476 US 355; 106 S Ct 1890; 90 L Ed 2d 369 (1986)..... 10

MCI Telecommunications Corporation, et al v Bellsouth Telecommunications, Inc,
298 F 3d 1269 (11th Cir, 2002)..... 15, 16

Strand v Verizon North, Inc,
531 US 957; 121 S Ct 380; 148 L Ed 2d 293 (October 30, 2000) 8

United States v Jones,
580 F2d 219 (6th Cir, 1978)..... 20

US West Communications, Inc v Sprint Communications Co,
275 F3d 1241 (10th Cir, 2002) 2, 23

Verizon Maryland, Inc v Public Service Comm of Md,
535 US 635; 122 S Ct 1753; 152 L Ed 2d 871 (2002) 24

Verizon North, Inc. et al v Federal Communications Commission, et al,
535 US 467; 122 S Ct 1646;
152 L Ed 2d 701 (2002) ..... passim

Verizon North, Inc. v John G. Strand, et al,
140 F Supp 2d 803 (WD Mich, 2000) 1

Verizon North, Inc. v John G. Strand, et al,
309 F3d 935 (6th Cir, 2000) 1

Statutes

28 USC 1254(1) 1

28 USC 1331 24

47 USC 251 ..... passim

47 USC 251(d)(3) 12, 18, 19, 22

47 USC 252 ..... passim

47 USC 252(e)(3) 12

47 USC 252(f) 18

47 USC 253(d) 3

47 USC 261 1

47 USC 261(b) 13

47 USC 261(c) 13, 18, 19, 21

Telecommunications Act of 1996,
Pub L No. 104-104, 110 Stat 56 (1996)
(codified at 47 USC 151-614) ..... passim

Rules

1996 Act § 601(c), 110 Stat 56, 143 (1996) (uncodified note to 47 USC 152)..... 12

FRE 201(f) 20

Peter W. Huber, *et al, Federal Telecommunications Law,* § 1.9 at 53-54 (footnotes omitted) (2nd ed. 1999)..... 4

OPINIONS BELOW

The published November 7, 2002 opinion of the Court of Appeals for the Sixth Circuit is reported at 309 F3d 935 (6th Cir, 2000) and is reprinted in the Appendix. App. to Pet. 1a-18a. The December 6, 2000 opinion of the United States District Court for the Western District of Michigan is reported at 140 F Supp 2d 803 (WD Mich, 2000) and is reprinted in the Appendix. App. to Pet. 19a-35a.

JURISDICTION

The opinion of the Court of Appeals was entered on November 7, 2002. This Petition for Certiorari is being filed within 90 days of the November 7, 2002 opinion. Jurisdiction of this Court is invoked under 28 USC 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case concerns the interpretation and application of the following statutory provisions, all of which are reproduced in the Appendix.

> Telecommunications Act of 1996, as enacted, §§ 153(29), 251, 252, 261, 47 USC §§ 153(29), 251, 252, 261. App. to Pet. 37a-58a.

STATEMENT OF THE CASE

A. Nature of the case

This Petition presents the question of whether the U.S. Court of Appeals for the Sixth Circuit correctly interpreted the interconnection agreement provision of the federal Telecommunications Act of 1996, Pub L No. 104-104, 110 Stat 56 (1996) (codified at 47 USC 151-614) (FTA). The Court of Appeals held that provision to be "central" to that federal legislation such that it preempted State Commission regulations intended to further competition in the telecommunications field. The Michigan regulations require incumbent local exchange carriers (ILECs) such as Verizon to offer network elements[1] and services to competing local exchange carriers (CLECs) through their state-filed tariffs. The Court of Appeals determined that the Michigan Public Service Commission order directing Verizon to offer network elements to competitors through its published state tariffs completely bypassed the FTA's "detailed" interconnection process and was thus inconsistent with, and preempted by, the FTA.

The Court of Appeals is wrong. Moreover, its decision cannot be reconciled with the 10th Circuit's decision in *US West Communications v Sprint* Communications, 275 F3d 1241 (10th Cir, 2002). Lastly, review and reversal of the decision is critical to continued state efforts to bring down the

---

[1] § 153(29) of the FTA defines "network element" as "a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." (App. to Pet. 36a)

barriers to telephone competition steadfastly maintained by ILECs and to further the goal of competition in the telecommunications industry that is at the heart of the FTA.

B. The Federal Telecommunications Act of 1996

In 1996, Congress enacted the FTA. Among the purposes of the FTA are the reduction of regulation in the telecommunications industry and the promoting of competition. To encourage the development of a competitive local telecommunications marketplace, Congress sought to remove the barriers to entry. Indeed, to the degree that any state laws or regulations bar competitive entry, such state restrictions are deemed preempted. 47 USC 253(d). The FTA identifies three ways in which new entrant may gain entry and compete in the local telecommunications marketplace:

> First, the 1996 Act allows a competitor to construct its own network and "interconnect" with the incumbent telephone company "for the transmission and routing" of traffic between the two networks. [47 USC § 251(c)(2).] Such interconnection is crucial to competitive entry because it allows customers on the new network to place calls to, and to receive calls from, customers on the incumbent's network.
>
> Second, Congress required incumbent telcos to offer competitors "access to network elements on an unbundled basis at any technically feasible point" and "in a manner that allows requesting carriers to combine such elements." [47 USC 251(c)(3).] Congress added this provision because it recognized that some key parts of the incumbents' network would be difficult to reproduce immediately. For instance, Congress understood that cable

> television companies planned to use their existing door-to-door networks to carry telephone calls as well as TV signals, but lacked the switches needed to direct calls from one customer to another. Conversely, some interexchange companies might have the necessary switches, but lack the loops to the customers' premises. By requiring access to parts of the incumbents' network, Congress allowed such companies to enter local markets as facilities-based carriers without reproducing the incumbent's complete network.
>
> Third, the 1996 Act requires incumbent local exchange carriers (LECs) "to offer for resale at wholesale rates any telecommunication service that the carrier provides at retail to subscribers who are not telecommunications carriers." [47 USC 251(c)(4).] Resale permits entry by potential competitors who have no facilities of their own. [Peter W. Huber, *et al, Federal Telecommunications Law,* § 1.9 at 53-54 (footnotes omitted) (2nd ed. 1999)]

Both federal and state agencies are integrally involved in the process of enabling new participants to gain entry into the telecommunications marketplace. The FTA carves out a significant role for state commissions under the new regulatory framework and preserves state regulation to the extent that it does not substantially prevent implementation of the FTA and its purposes.

C. The Michigan Public Service Commission's orders

MPSC Case No. U-10860 was a "generic" proceeding to consider various interconnection issues relating to basic local exchange service competition, including whether unbundled elements should be priced using the company's total service long run incremental cost (TSLRIC). The MPSC issued its decision in MPSC Case No. U-10860 on June 5, 1996, finding TSLRIC to be an appropriate pricing standard. Verizon filed for rehearing asserting that rates based upon Verizon's TSLRIC for unbundled loops (and other services) would be confiscatory. The MPSC determined in its Rehearing Order that interconnection rates set at TSLRIC were not confiscatory since those rates allowed Verizon to recover its costs of providing the network.

Verizon appealed the MPSC's decision to the Michigan Court of Appeals. Specifically, Verizon challenged the MPSC's authority to require the unbundling and pricing of network elements. The Michigan Court of Appeals affirmed MPSC Case No. U-10860 in its entirety in *GTE North, Inc v MPSC, et al,* Mich Ct Apps No. 198324 (unpublished opinion, Dec 30, 1997). (App. to Pet. 59a-67a) In affirming, the Michigan Court of Appeals stated:

> Our Legislature has made a policy decision to deregulate telephone services and to introduce competition into telephone services. This policy is reflected in the MTA. 1991 PA 179, effective January 1, 1992, and 1995 PA 216, effective November 30, 1995. Providers of basic local exchange service such as GTE [Verizon] are required to "unbundle" and to price separately each basic local exchange service they provide and other providers must be allowed to purchase the services. MCL

> 484.2355; MSA 22.1469(355), MCL 484.2357(1); MSA 22.1469(357)(1). The rate a provider of basic local exchange service can charge for interconnecting with its service is the provider's "total service long run incremental cost" (TSLRIC) of providing the service, at least until January 1, 1997. MCL 484.2352(l); MSA 22.1469(352)(l). Until studies regarding TSLRIC costs are approved by the PSC, the rates for "unbundled loops" and certain other services are to be those established pursuant to PSC case U-10647. MCL 484.2352(2); MSA 22.1469(352)(2). After January 1, 1997, the rate for interconnection shall be "just and reasonable" as determined by the PSC. Providers of local exchange service are to file tariffs with the PSC which set forth their wholesale rates, and such rates must be at levels no greater than the provider's current retail rate less the provider's avoided costs. MCL 484.2357(4); MSA 22.1469(357)(4). Thus, our Legislature has addressed some of the specifics of pricing during and after deregulation. Doing so was well within the Legislature's authority. *Duquesne Light Co v Barasch,* 488 US 299, 313; 109 S Ct 609; 102 L Ed 2d 646 (1989).

Consistent with the Commission's order in MPSC Case No. U-10860, subsequent proceedings were established for both Ameritech and Verizon for the purpose of determining the prices for unbundled networks as well as for basic local exchange services. MPSC Case No. U-11281 was specifically established to address Verizon's cost studies. The MPSC issued a decision in the matter on February 25, 1998. In that decision, the MPSC stated:

There has been a great deal of controversy regarding incumbent providers' obligations to make unbundled network elements available in combinations or platforms. The Commission addressed this issue in an order dated January 28, 1998 in Case No. U-11280 (Ameritech Michigan cost study). **Consistent with that order, the Commission finds that GTE [Verizon] should be required to offer combinations or platforms.** The Commission reiterates that the Michigan Telecommunications Act requires it to administer and enforce the obligations of incumbent providers, which, as set forth in Section 355, requires the separation of basic local exchange service into its loop and port [fn omitted] elements "at a minimum." MCL 484.2355(2); MSA 22.1469(355)(2). As the Commission acknowledged in the January 28, 1998 order in Case No. U-11280, at 21-22, the same principles that mandate the separation of basic local exchange service into its loop and port elements "at a minimum" make it appropriate to consider further disaggregation into their smaller, constituent parts. **Offering unbundled network elements as combinations or platforms is a matter of defining the level of disaggregation at which unbundling will occur. The Commission reaffirms its prior holding on an incumbent's obligation to provide combinations of elements and directs GTE [Verizon] to incorporate that holding in the tariffs that it will submit to implement this order.** [Emphasis added.]

On March 10, 1998, Verizon filed a petition for rehearing in case U-11281. On May 11, 1998, the MPSC issued its order denying rehearing. Prior to the MPSC rehearing decision, Verizon filed a complaint in U.S. District Court challenging the MPSC action.

D. The U.S. District Court Opinion and Order

Verizon North Incorporated,[2] filed a four-count complaint against the MPSC Commissioners in the U.S. District Court for the Western District of Michigan on March 18, 1998. The complaint sought review of a MPSC February 25, 1998 Order in MPSC Case No. U-11281. On June 15, 1998, the District Court granted the MPSC Commissioners' Motion to Dismiss, holding that it lacked subject matter jurisdiction to hear the complaint. Verizon appealed that ruling to the Court of Appeals, which reversed the District Court in *GTE North, Inc v Strand,* 209 F3d 909 (6th Cir, 2000).[3] In that case, the Court limited its review to the jurisdictional issues and remanded the case to the District Court for a determination on the merits.

On December 6, 2000, the District Court issued its opinion and ordered that a declaratory judgment be entered in favor of Plaintiff Verizon, declaring that the tariff and bundling requirements of the MPSC's February 25, 1998 Order are in conflict with and preempted by the FTA.

---

[2] The case was originally brought by GTE North Incorporated. As a result of a June 30, 2000 merger between GTE Corporation and Bell Atlantic Corporation. GTE North Incorporated changed its legal name to Verizon North Incorporated.

[3] The MPSC Commissioners filed a Writ of Certiorari seeking review of this Court's decision which was denied *sub nom Strand v Verizon North, Inc,* 531 US 957; 121 S Ct 380; 148 L Ed 2d 293 (2000).

With regard to the tariffing requirement, the District Court stated:

> Such specificity indicates that the negotiation and arbitration process plays an integral role in achieving Congress's goals of enhancing competition. . . By requiring Verizon to file public tariffs offering its network elements at wholesale services for sale to any party, the MPSC's Order improperly permits an entrant to purchase Verizon's network elements and finished services from a set menu without ever entering into the process to negotiate and arbitrate an interconnection agreement. It thus evades the exclusive process required by the 1996 Act, and effectively eliminates any incentive to engage in private negotiation, which is the centerpiece of the Act. Accordingly, the Court finds that the tariff requirement in the February 25 order is inconsistent with and preempted by the FTA. [App. to Pet. 27a]

Also on December 6, 2000, the Court entered an Order and Declaratory Judgment consistent with its Opinion.

On December 20, 2000 the individual Michigan Public Service Commissioners appealed the district court's granting of a declaratory judgment in favor of Verizon to the United States Court of Appeals for the Sixth Circuit. In a November 7, 2002 Opinion the Court of Appeals affirmed the district court on the state tariff requirement, holding that the MPSC's tariff requirement:

> [C]ompletely bypasses and ignores the detailed process for interconnection set out by Congress

> in the FTA, under which competing telecommunications providers can gain access to incumbents' services and network elements by entering into private negotiations and arbitration aimed at creating interconnection agreements that are then subject to state commission approval, FCC oversight, and federal judicial review. This is "inconsistent with the provisions of [the FTA]," and therefore preempted. [App. to Pet. 9a]

REASONS FOR GRANTING THE PETITION

I. In the federal Telecommunications Act, Congress intended to preserve and encourage pro-competitive state regulations.

Congressional intent determines whether federal law preempts state law. "[T]he critical question in any preemption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm v Federal Communications Comm,* 476 US 355, 369; 106 S Ct 1890; 90 L Ed 2d 369 (1986) (*"Louisiana PSC"*). The U.S. Supreme Court in *Louisiana PSC* explained when Congress can be understood to have preempted state law:

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law..., when there is outright or actual conflict between federal and state law..., where compliance with both federal and state is in effect physically impossible..., where there is implicit in federal law a barrier to state regulation..., where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States

> to supplement federal law..., or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.... [476 US at 368-369 (citations omitted)]

The Court of Appeals has essentially held that Congress has occupied the field of regulation with respect to the manner of interconnection. However, federal occupation of a field will not be lightly inferred:

> The principle to be derived from [Supreme Court] decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion or that the Congress has unmistakably so ordained.

Florida Lime & Avocado Growers v Paul, 373 US 132, 147; 83 S Ct 1210; 10 L Ed 2d 248 (1963). Moreover, preemption of matters "within the traditional police power of the State should not be lightly inferred." *Fort Halifax Packing Co v Coyne,* 482 US 1, 21; 107 S Ct 2211; 96 L Ed 2d (1987). A federal statute will be read to supersede a State's historic powers only if this is "the clear and manifest purpose of Congress." *Hillsborough Co v Automated Medical Laboratories, Inc,* 471 US 707, 715; 105 S Ct 2371; 85 L Ed 2d 714 (1985). Conflict preemption arises only when there is an irreconcilable conflict between state and federal law because compliance with both is a "physical impossibility" or when the state law stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress. *Florida Lime & Avocado Growers v*

Paul, supra, 142-143 (1963); *Hines v Davidowitz,* 312 US 52, 67; 61 S Ct 399; 85 L Ed 581 (1941).

In a clear acknowledgement of state efforts to promote competition in the local telecommunications marketplace, Congress plainly indicated in the FTA that, unless expressly preempted, state requirements would be preserved, stating:

> This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments. [1996 Act § 601(c), 110 Stat 56, 143 (1996) (uncodified note to 47 USC 152)]

Congress' intent not to preempt state telecommunications laws is underscored by the operative terms of the FTA.

Consistent with the congressional intent to preserve state law:

- 47 USC 251(d)(3) expressly provides that the Federal Communications Commission (FCC) may not preclude the enforcement of any state regulation, order or policy of a State Commission that establishes the access and interconnection obligations of local exchange, provided that the state requirement is consistent with FTA requirements and does not substantially prevent implementation of the FTA, § 251 (47 USC 251) or its purposes;

- 47 USC 252(e)(3) expressly allows state commissions to establish and enforce state law requirements in interconnection agreements during the state approval review;

- 47 USC 261(b) expressly preserves a state commission's power to enforce state regulations prescribed prior to the FTA's enactments, provided the state regulations are not inconsistent with the FTA;

- 47 USC 261(c) specifically preserves a state's authority to impose requirements on a telecommunications carrier for intrastate services that are necessary to further competition as long as the state requirements are not inconsistent with the FTA.

Collectively, these statutory provisions establish that the FTA was intended to supplement state laws that promote competition, and was not intended to displace state laws promoting competition. The MPSC's February 25, 1998 order is preempted only if it is inconsistent with and substantially prevents implementation of the purposes of the FTA.

The Court of Appeals erred when it held that the MPSC's February 25, 1998 Order that required Verizon to offer unbundled network elements and services through published tariffs was in conflict with and preempted by the FTA, § 252. The Court's ruling should be reversed because nothing in the FTA evinces a congressional intent to preempt pro-competitive state regulation, and because the MPSC's order is entirely consistent with both the language of the FTA itself and the full purposes and objectives of Congress in enacting the FTA.

II. The Court of Appeals erred when it found the tariff requirement in the MPSC's order to be inconsistent with and preempted by the FTA.

This Court has recognized that competition and nondiscrimination in the area of telecommunication services are goals of the FTA. In *Verizon North, Inc. et al v Federal*

Communications Commission, et al, 535 US 467; 122 S Ct 1646; 152 L Ed 2d 701 (2002) this Court observed that the local competition provisions of the FTA were intended to "...reorganize markets by rendering regulated utilities' monopolies vulnerable to interlopers..." *Id.*,, 122 S Ct at 1661. This Court observed that the "novel ratesetting" scheme of the FTA was "designed to give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property." *Id.*

Specifically with regard to the Federal Communications Commission combination rules addressed in that decision, this Court observed:

> The additional combination rules are best understood as meant to ensure that the statutory duty to provide unbundled elements gets a practical result. A separate rate for an unbundled element is not much good if an incumbent refuses to lease the element except in combination with others that competing carriers have no need of; or if the incumbents refuse to allow the leased elements to be combined with a competitor's own equipment. And this is just what was happening before the FCC devised its combination rules. Incumbents, according to the FCC's findings, were refusing to give competitors' technicians access to their physical plants to make necessary connections. *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3910, ¶482 (1999) (Third Report and order), petitions for review pending *sub nom. United States Telecom Assn. v. FCC*, Nos. 00-1015, etc. (CADC). [122 S Ct at 1683-1684]

This Court concluded:

> In sum, what we have are rules that say an incumbent shall, for payment, "perform the functions necessary," 47 CFR §§51.315(c) and (d) (1997), to combine network elements to put a competing carrier on an equal footing with the incumbent when the requesting carrier is unable to combine, First Report and Order ¶294, when it would not place the incumbent at a disadvantage in operating its own network, and when it would not place other competing carriers at a competitive disadvantage, 47 CFR §51.315(c)(2) (1997). This duty is consistent with the Act's goals of competition and nondiscrimination, and imposing it is a sensible way to reach the result the statute requires. [122 S Ct at 1687]

The design of the FTA, and its twin goals of competition and nondiscrimination, are frustrated by a Sixth Circuit interpretation of the FTA that restricts and confines a CLECs entry into the telecommunications market in all instances to its ability to negotiate or arbitrate an interconnection agreement with an ILEC that may be less than enthusiastic about the competition.

The difficulty associated with regarding private party negotiation of interconnection agreements pursuant to Section 252 as the "centerpiece" of the FTA is underscored by the position advanced by an ILEC in *MCI Telecommunications Corporation, et al v Bellsouth Telecommunications, Inc*, 298 F 3d 1269 (11th Cir, 2002). In that case, Bellsouth, the ILEC, had argued that:

> . . .§ 251(c)(1) of the Act places on incumbents the obligation "to negotiate in good faith in accordance with section 252 [only] the particular terms and conditions of agreements to fulfill the duties of [§§ 251(b) & (c)]." This means that, while incumbents may choose to negotiate other issues, nothing in the Act requires them to reach peripheral agreements like the enforcement and compensation provisions desired by MCI. Thus, BellSouth argues, § 252(b)(1)'s language "any open issues" can only be read to include those issues which an incumbent is mandated to negotiate.... (298 F3d at 1274).

The Eleventh Circuit agreed, holding that the scheme and text of the FTA limited the number of issues on which ILECs are mandated to negotiate. *Id.* This decision only serves to demonstrate that, rather than being the "centerpiece" of the FTA, Section 252 is, simply put, the companion provision to Section 251, *AT&T Communications of the Southern States, Inc v Bellsouth Telecommunications, Inc*, 7 F Supp 2d 661, 665 (ED No Car, 1998), and permits parties to negotiate terms within or outside the confines of Section 251, which would be binding on those parties to the extent that such terms were consistent with the public interest. *Id.* at 666.

A. The Court of Appeals erred when it set aside Michigan's tariffs on the basis that an arbitrated or negotiated interconnection agreement was the exclusive procedure by which CLECs may obtain interconnection.

In *Verizon North v FCC, supra*, this Court addressed three varied strategies that may be pursued by competitors under the FTA:

> First, a competitor entering the market (a "requesting" carrier, §251(c)(2)), may decide to engage in pure facilities-based competition, that is, to build its own network to replace or supplement the network of the incumbent. If an entrant takes this course, the Act obligates the incumbent to "interconnect" the competitor's facilities to its own network to whatever extent is necessary to allow the competitor's facilities to operate. §§251(a) and (c)(2). At the other end of the spectrum, the statute permits an entrant to skip construction and instead simply to buy and resell "telecommunications service," which the incumbent has a duty to sell at wholesale. §§251(b)(1) and (c)(4). Between these extremes, an entering competitor may choose to lease certain of an incumbent's "network elements," which the incumbent has a duty to provide "on an unbundled basis" at terms that are "just, reasonable, and nondiscriminatory." §251(c)(3). [122 S Ct at 1662; Footnote omitted.]

The Court of Appeals nonetheless held that the interconnection agreement was the **exclusive** method by which a CLEC could lawfully obtain access to the ILEC's system. The Court stated:

> The MPSC order at issue here establishes a different route for competitors to obtain services and network elements from incumbents. The order requires Verizon to file tariffs with the state, "set[ting] forth the rates, terms, and conditions" under which competitors might acquire network elements and services.

> MPSC Feb. 25, 1998 Order at 9-10, J.A. at 264-65. As the district court in this case explained, the order requires incumbents "to file tariffs offering its network elements and services for sale on fixed terms to all potential entrants **without the necessity of negotiating an interconnection agreement.**" *Verizon North, Inc.*, 140 F. Supp. 2d at 809 (emphasis added). In this way, the MPSC order permits competitors to purchase the services and elements directly off of the tariff menu, obviating the need to negotiate or arbitrate an interconnection agreement. [App. to Pet. 7a; Emphasis added.]

The Court of Appeals conclusion, however, is contrary to the plain language of the FTA which provides for alternative methods by which a CLEC may interconnect with the ILEC's system.

In addition to the negotiation and arbitration process, the federal Telecommunications Act provides that a CLEC may obtain interconnection with an ILEC through a statement of generally available terms pursuant to 47 USC 252(f)[4] or through state commission regulations governing access and interconnection pursuant to 47 USC 251(d)(3) and 47 USC 261(c).

---

[4] A review of 47 USC 252(f) establishes that the statement of generally available terms (SGAT) contains no negotiation or arbitration requirement, as it is solely the product of the ILEC. Further, it is worth noting that the SGAT must be approved by the state commission. Thus, where the ILEC is a former Bell Operating Company, once the SGAT has been approved, the CLEC may obtain interconnection just as if it had negotiated and arbitrated an interconnection agreement approved by the State Commission. Because, in Michigan, Verizon is not a former Bell operating company, the filing of a SGAT pursuant to 47 USC 252(f) is not applicable to Verizon.

47 USC 251(d)(3) and 47 USC 261(c) expressly reserve to State Commissions the authority to enforce regulations governing access, interconnection and services. 47 USC 251(d)(3) provides:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a state commission that –
>
> (A) **establishes access and interconnection obligations of local exchange carriers;**
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not **substantially prevent** implementation of the requirements of this section and the purposes of this part. [Emphasis added.]

47 USC 261(c) provides:

> Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

Thus, the FTA clearly provides that a State Commission may establish access and interconnection obligations of an ILEC provided the obligations are consistent

with and do not substantially prevent implementation of the requirements of 47 USC 251 and the purposes of the FTA. The MPSC's February 25, 1998 Order does not substantially prevent implementation of the requirements of 47 USC 251 and is fully consistent with the FTA's purpose of promoting competition.

The MPSC order requiring the filing of tariffs is consistent with the regulatory structure elsewhere. For example, Verizon has on file at the New York State Public Service Commission tariffs for many of the same services at issue in this case, e.g., P.S.C. No. 916 - Telephone, New York Telephone Company, Section 5, original pages 79-86 (see Addendum B).[5]

The MPSC's February 25, 1998 order clearly is intended to promote competition. Thus, it is consistent with the purposes of the FTA. The February 25, 1998 order does not substantially prevent implementation of 47 USC 251, unless that section is read as setting forth the private, party-specific negotiation/arbitration as the exclusive method by which competing local exchange carriers may obtain interconnection. If interconnection may be obtained by another manner, as the plain language of the FTA provides and the MPSC order here permits, then there can be no merit to any claim that the February 25, 1998 order substantially prevents implementation of the FTA, § 251.

---

[5] The MPSC Commissioners request that the Court take judicial notice pursuant to FRE 201(f) and *United States v Jones*, 580 F2d 219, 223 (6th Cir, 1978) of Verizon's publicly filed State of New York tariff. Also, the Verizon company providing local telephone service in the state of New York is New York Telephone Company.

B. The Court of Appeals preemption analysis misapprehends the role performed by State Commissions in the interconnection process and is thus contrary to congressional intent.

The Court of Appeals preemption analysis misapprehends the importance of the State Commission in the interconnection process, as that process is expressed by Congress through the FTA. The Court of Appeals incorrectly viewed "private negotiation" as the "centerpiece of the Act." (App. to Pet. 8a). To the contrary, it is State Commission approval that is the single common element in all methods by which interconnection may be obtained pursuant to the FTA. All three methods, i.e. negotiation/arbitration, statement of generally available terms, and state tariffs each require some form of State Commission approval. The "centerpiece" of the FTA is the resulting competition, and both the FCC and State Commissions play an active role in achieving that result.

In addition to being at odds with the plain language of the FTA, the Court of Appeals analysis serves to diminish the importance of the role played by State Commissions, not only with respect to their actions in reviewing and approving the rates, terms and conditions of interconnection, but in achieving a competitive marketplace in the provision of local telecommunications services.

The fact that Congress provided such a significant role for State Commissions in this interconnection process is hardly surprising since, after all, it has been the State Commissions that historically have regulated the ILECs and are the agencies most familiar with existing rates, terms, practices and conditions of services provided by the ILECs. Clearly, in recognition of that significant state commission role, Congress, in Section 261(c) [47 USC 261(c)], expressly preserved the authority of State Commissions to impose state law requirements that are not inconsistent with Sections 251 and

252 of the FTA, 47 USC 251, 47 USC 252. Likewise, in Section 251(d)(3) [47 USC 251(d)(3)] Congress preserved a state's authority to regulate access and interconnection obligations of local exchange carriers so long as that regulation is consistent with Section 251 and does not substantially prevent the implementation of Section 251 or the purpose of the FTA. Other than finding that the Commission's order displaces private negotiation, which the Court of Appeals erroneously viewed as exclusive, there is nothing in the MPSC order that either substantially prevents the implementation of Section 251 or otherwise impedes the purposes of the act. Indeed, the actions of the MPSC in issuing the challenged order, authorized by a state telecommunications law that shares the same purpose of the FTA – to promote competition.

The Court of Appeals view of the FTA, i.e. that private negotiation is the centerpiece of the Act, displaces the State Commission from its Congressionally designated role as an integral and active participant to the interconnection process and relegates it to little more than a sideline observer. In short, in the Court of Appeals view, the only lawful way a competitive local telecommunications marketplace may be achieved under the FTA is through "private, party-specific negotiation and arbitration system." (App. to Pet. 27a). Instead, quite the opposite is true. Competition in the local, telecommunications marketplace is to be achieved under the auspices of and subject to the approval of the State Commission, a public body.

III. The Circuit Court's decision cannot be reconciled with an opinion from the Tenth Circuit, and if permitted to stand would place CLECs and telecommunications customers within the Sixth Circuit's jurisdiction at a competitive disadvantage.

In its November 7, 2002 decision, the Circuit Court cited to and relied upon *US West Communications, Inc v Sprint Communications Co*, 275 F3d 1241 (10th Cir, 2002) in support of its conclusion that the MPSC order at issue here provided for an "alternative route around the entire interconnection process". In *US West*, MCI and Sprint each sought inclusion in their interconnection agreements of a "most favored nation" clause that would permit them to 1) pick any clause from any other interconnection agreement negotiated or arbitrated by any other carrier connected with Qwest, and 2) purchase services from Qwest out of any effective tariff filed by Qwest with the Colorado Public Utility Commission (CPUC) regardless of the prices otherwise established in the parties' interconnection agreement. *US West, supra,* at 1245.

The holding in *US West* is inconsistent with the Court of Appeals decision here for two reasons. First, the *US West* case clearly approved the use of tariffs that had been filed with the CPUC. The existence of those state tariffs permitted MCI and Sprint to purchase services from the tariff if they chose, interconnection agreement permitting. In the Sixth Circuit's view, all terms must be negotiated or arbitrated and included in the interconnection agreement, and this "pick and choose" mechanism would thus not be available.

Secondly, it is difficult to appreciate how the "pick and choose" option approved in *US West* is any more inconsistent with the FTA's interconnection process than the tariff provision ordered by the MPSC here. Certainly, the tariffs filed with the CPUC and from which MCI and Sprint could,

with the Tenth Circuit's approval, purchase services notwithstanding any interconnection agreement, would suffer the same infirmities the Court of Appeals here found with the Michigan tariff mechanism, i.e. the lack of federal court review of the state tariff orders that the Court of Appeals here found so important to the federal regulatory scheme.[6]

The decisions of the Sixth and Tenth Circuits cannot be reconciled, and the result is that the Court of Appeals decision here places CLECs in this jurisdiction at both a negotiating and competitive disadvantage compared to their counterparts in the Tenth Circuit, and thus serves to deny to consumers in this Circuit the full benefits of the competition intended to be afforded by the FTA.

---

[6] While the Court of Appeals states that "there is no provision for federal court review of state tariff orders", 209 F3d at 942, Petitioners would submit that just such an order was the subject of federal judicial review in the instant case. However, such an assertion seems to disregard the provisions at 28 USC 1331. *Verizon Maryland, Inc v Public Service Comm of Md,* 535 US 635; 122 S Ct 1753; 152 L Ed 2d 871 (2002).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted

Michael A. Cox
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
Telephone: (517) 373-1124

David A. Voges
Steven D. Hughey
Michael A. Nickerson
Assistant Attorneys General
Attorneys for Petitioners

Dated: February, 2003

APPENDIX

TABLE OF CONTENTS

Page

Opinion in U.S. Court of Appeals, Sixth Circuit No. 01-1013, dated November 7, 2002.....1a

Opinion in United States District Court, Western District of Michigan No. 5:98-CV-38, dated December 6, 2000.....19a

47 USC 153(29).....36a

47 USC 251.....37a

47 USC 252.....47a

47 USC 261.....57a

Unpublished Opinion of the Michigan Court of Appeals in *GTE North, Inc v MPSC, et al,* Docket No. 198324, dated December 30, 1997).....59a

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

VERIZON NORTH, INC.,

Plaintiff-Appellee,

No. 01-1013

v.

JOHN G. STRAND, Chairman;
JOHN C. SHEA, Commissioner; and
DAVID A. SVANDA, Commissioner,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Michigan at Lansing.
No. 98-00038--Robert Holmes Bell, Chief District Judge.

Argued: June 20, 2002

Decided and Filed: November 7, 2002

Before: BOGGS, NORRIS, and BATCHELDER,
Circuit Judges.

COUNSEL

ARGUED: David A. Voges, ASSISTANT ATTORNEY GENERAL, PUBLIC SERVICE DIVISION, Lansing, Michigan, for Appellant. Gerald Masoudi, KIRKLAND & ELLIS, Washington, D.C., for Appellee. Brian J. Leske, WORLDCOM, INC., Washington, D.C., for Amici Curiae.

ON BRIEF: David A. Voges, Henry J. Boynton, ASSISTANT ATTORNEYS GENERAL, PUBLIC SERVICE DIVISION, Lansing, Michigan, for Appellant. Patrick F. Philbin, KIRKLAND & ELLIS, Washington, D.C., for Appellee. Brian J. Leske, WORLDCOM, INC., Washington, D.C., Darryl M. Bradford, Sona Rewari, JENNER & BLOCK, Chicago, Illinois, David L. Lawson, Jennifer M. Rubin, SIDLEY, AUSTIN, BROWN & WOOD, Washington, D.C., Leland R. Rosier, CLARK HILL, Okemos, Michigan, for Amici Curiae.

OPINION

BOGGS, Circuit Judge. Commissioners John G. Strand, John C. Shea, and David A. Svanda of the Michigan Public Service Commission (the "MPSC") appeal from the district court's grant of a declaratory judgment in favor of Verizon North, Inc. ("Verizon")[1] in Verizon's suit challenging a February 25, 1998 order of the MPSC (the "February 25 order" or the "order"). Verizon, an incumbent local telecommunications carrier in Michigan, alleged that the order conflicted with, and was preempted by, the federal Telecommunications Act of 1996 (the "FTA" or the "Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in various sections of 47 U.S.C.) to the extent that it required incumbents to offer network elements and services to competitors through published tariffs and to combine unbundled network elements for competitors. The district court agreed and granted injunctive relief from both aspects of the order. For the reasons set forth below, we affirm the district court's judgment with respect to the tariff requirement, but vacate the judgment with respect to the bundling requirement.

---

[1] The case was instituted by GTE North Inc., which in 2000 became Verizon North, Inc.

I

This is the second time that this case has reached this court. In our first decision, issued on April 20, 2000, we explained the history and substance of the action brought by Verizon (which at the time was still GTE):

> [In December 1996,] the MPSC initiated . . . state law proceedings against GTE and other incumbent [Local Exchange Carriers, or "LECs"] in order to establish terms of interconnection to Michigan local exchange networks generally. . . . In connection with these general interconnection proceedings, the MPSC required GTE and Ameritech, as Michigan LECs, to file with the Commission "Total Service Long Run Incremental Cost" (TSLRIC) studies for both regulated and non-regulated telecommunications services. In addition, the MPSC directed GTE to publish tariffs in which GTE would offer to sell its network elements and wholesale services to any interested party at rates predetermined by the Commission. GTE responded to the Commission's order by filing a petition for rehearing in which GTE challenged the MPSC's rates for unbundled loops as confiscatory in violation of the FTA. The MPSC denied GTE's petition for rehearing, and GTE appealed the MPSC's order to the Michigan Court of Appeals. On December 30, 1997, the court affirmed the MSPC's order, and the MPSC proceeded to use GTE's and Ameritech's TSLRIC studies to determine prices for new entrants' access to bundled and unbundled network elements and basic local exchange services throughout Michigan.

> On February 25, 1998, in the course of the state proceedings against GTE and Ameritech, the MPSC issued the order contested in this appeal. In the February 25 order, the MPSC used GTE's TSLRIC studies to establish the rates at which GTE would be compelled to sell unbundled network elements to its competitors. In addition, the order stated that the FTA requirement that GTE allow competitors to access pieces, or unbundled elements, of GTE's local network did not preclude GTE's competitors from requesting access to pre-assembled, fully operational local service platforms. Upon receiving the order, GTE sued the MPSC in the district court, alleging that the Commission, acting pursuant to Michigan law, violated the FTA when it issued the February 25 order: (1) directing GTE to provide competitors with access to pre-assembled, fully operational service platforms; and (2) requiring GTE to publish tariffs offering to sell elements of its network at rates predetermined by the Commission.

GTE North, Inc. v. Strand, 209 F.3d 909, 913-14 (6th Cir. 2000) ("*Verizon I*").

In that first decision, this court reviewed the district court's dismissal of the case for lack of subject matter jurisdiction. The district court had held that it lacked jurisdiction in the case, because § 252(e)(6) of the Act (47 U.S.C. § 252(e)(6)) gives federal courts jurisdiction to review state commission orders approving or rejecting final interconnection agreements and the February 25 order was not such an order. This court determined that the limitation on federal review set forth in § 252(e)(6) did not apply and held that, since the action presents a potential instance of federal preemption, the district court had jurisdiction to review the

order under its general federal question jurisdiction (28 U.S.C. § 1331). *See Verizon I*, 209 F.3d at 915-20. Further, this court held that Verizon's suit against the individual commissioners in their official capacity, which seeks only prospective injunctive relief, is appropriate under *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908).[2] *See Verizon I*, 209 F.3d at 922. Accordingly, this court remanded the case to the district court for consideration of the merits.

On remand, the district court granted Verizon's motion for summary judgment and struck down both challenged portions of the MPSC order, holding that they conflicted with and were preempted by the FTA. First, the court held that the tariff requirement was invalid, because it would allow competitors to circumvent the negotiation and arbitration process set out in § 252 of the Act. *Verizon North, Inc. v. Strand*, 140 F. Supp. 2d 803, 809-10 (W.D. Mich. 2000). Second, the court held that requiring incumbents to combine previously unbundled network elements at competitors' request violated the plain language of the Act, which requires incumbents to provide competitors access to network elements "in a manner that allows *requesting carriers* to combine such elements." *Verizon North, Inc.*, 140 F. Supp. 2d at 810 (quoting 47 U.S.C. § 251(c)(3) (emphasis added)). The MPSC filed a timely appeal from both holdings.

II

The Tariff Requirement

---

[2] In its present appeal, the MPSC again challenges this court's jurisdictional and *Ex parte Young* holdings. However, after the parties' briefs were filed, the Supreme Court decisively answered the questions raised by the MPSC. In *Verizon Md. Inc. v. PSC*, 152 L. Ed. 2d 871, 122 S. Ct. 1753 (2002), the Court held that § 252(e)(6) does not divest federal courts of federal question jurisdiction under 28 U.S.C. § 1331, *id.* at 1758, and that a suit seeking injunctive relief from individual state commissioners is proper under *Ex parte Young*. *Id.* at 1760-61.

Congress passed the FTA in order to end local telecommunications monopolies and engender competition in local telecommunications markets. To attain these goals, the Act imposes various requirements on incumbent telecommunications providers. The requirements include the duty to: (1) permit competitors who have built their own telecommunications networks to interconnect with the incumbent's network "for the transmission and routing" of traffic between the networks, 47 U.S.C. § 251(c)(2); (2) permit competitors to lease elements of the incumbent's network in order to allow the competitors to provide retail services through such a network, *id.* at § 251(c)(3); and (3) permit competitors to purchase telecommunications services at wholesale prices in order to allow the competitors to resell those services to retail customers, *id.* at § 251(c)(4).

In order to facilitate this interconnection, leasing, and wholesaling, Congress designed a comprehensive system, under which requesting competitors and incumbent providers are to enter into interconnection agreements setting forth the terms and conditions of their business relationship. *Id.* at §§ 251(c)(1), 252. First, the Act explains that, "upon receiving a request for interconnection, services, or network elements . . . an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier . . . ." *Id.* at § 252(a)(1). In this regard, the FTA places on incumbents the duty to "negotiate in good faith the terms and conditions of such agreements." *Id.* at § 251(c)(1). However, either party to the negotiation may ask the relevant state commission to mediate any unresolved issues. *Id.* at § 252(a)(2). If negotiation between the incumbent and the competitor does not produce an agreement, the FTA provides that either party can, during a specific time period, ask the state commission to undertake binding arbitration of any open issues, and the FTA provides specific guidelines for such arbitration. *Id.* at § 252(b)-(d).

Once an interconnection agreement is reached, either through negotiation or arbitration, the FTA requires the relevant state commission to approve or reject the agreement, and it provides specific guidelines for the approval process. *Id.* at § 252(e). If the state commission does not act within a prescribed time period, the FTA provides for the Federal Communications Commission (FCC) to decide, which action preempts the state commission. *Id.* at § 252(e)(5). If the state commission makes a determination on the proposed interconnection agreement within the required time, the FTA provides that a party aggrieved by the commission's determination may bring an action for review in federal district court. *Id.* at § 252(e)(6).

The MPSC order at issue here establishes a different route for competitors to obtain services and network elements from incumbents. The order requires Verizon to file tariffs with the state, "setting forth the rates, terms, and conditions" under which competitors might acquire network elements and services. MPSC Feb. 25, 1998 Order at 9-10, J.A. at 264-65. As the district court in this case explained, the order requires incumbents "to file tariffs offering its network elements and services for sale on fixed terms to all potential entrants *without the necessity of negotiating an interconnection agreement." Verizon North, Inc.*, 140 F. Supp. 2d at 809 (emphasis added). In this way, the MPSC order permits competitors to purchase the services and elements directly off of the tariff menu, obviating the need to negotiate or arbitrate an interconnection agreement.

After surveying the provisions of the FTA discussed herein, the district court wrote:

> Congress designed a deregulatory process that would rely in the first instance on private negotiations to set the terms for implementing new duties under the Act. In contrast to the private, party-specific negotiation and

> arbitration system created by Congress, the process for sale of network elements required by the MPSC's Order is a public rule of general application. By requiring Verizon to file public tariffs offering its network elements at wholesale services for sale to any party, the MPSC's Order improperly permits an entrant to purchase Verizon's network elements and finished services from a set menu without ever entering into the process to negotiate and arbitrate an interconnection agreement. It thus evades the exclusive process required by the 1996 Act, and effectively eliminates any incentive to engage in private negotiation, which is the centerpiece of the Act. Accordingly, the Court finds that the tariff requirement in the February 25 order is inconsistent with and preempted by the FTA.

Verizon North, Inc., 140 F. Supp. 2d at 810.

We agree with the district court. The central question in preemption analysis is always "whether Congress intended that federal regulation supersede state law." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369, 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1986). By its terms, the FTA does not preempt state commission rules "if such regulations are not inconsistent with the provisions of [the FTA]." 47 U.S.C. § 261(b). *See also id.* at § 261(c) (permitting state commissions to impose certain additional requirements on telecommunications carriers, "as long as the State's requirements are not inconsistent with [the FTA]"). Therefore, Congress has clearly stated its intent to supersede state laws that are inconsistent with the provisions of the FTA. *See Verizon I*, 209 F.3d at 923 ("it is precisely because state utility commissions play such a critical role in administering the FTA's regulatory framework that they must operate strictly within the confines of the statute"); see also *MCI Telecomms. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 343

(7th Cir. 2000) ("Congress, exercising its authority to regulate commerce has precluded all other regulation except on its terms."). Further, as the district court in this case pointed out, state law provisions can be inconsistent with, and therefore preempted by, federal law even if the federal and state laws share a common goal. See *Verizon North, Inc.*, 140 F. Supp. 2d at 809. Even in the case of a shared goal, the state law is preempted "if it interferes with the methods by which the federal statute was designed to reach [its] goal." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103, 120 L. Ed. 2d 73, 112 S. Ct. 2374 (1992) (quoting *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 93 L. Ed. 2d 883, 107 S. Ct. 805 (1987))[3].

In the present case, the MPSC order completely bypasses and ignores the detailed process for interconnection set out by Congress in the FTA, under which competing telecommunications providers can gain access to incumbents' services and network elements by entering into private negotiation and arbitration aimed at creating interconnection agreements that are then subject to state commission approval, FCC oversight, and federal judicial review. This is "inconsistent with the provisions of [the FTA]," and therefore preempted.

The best argument to the contrary, set out by the MPSC and amici, is that while the interconnection agreement process

---

[3] Amici contend that the district court erred in relying on *Gade*, as *Gade* involved preemption under the Occupational Safety and Health Act ("OSH Act"), which does not permit supplemental state regulation. In contrast, amici explain, the FTA expressly permits supplemental state regulation. However, it is irrelevant that the FTA permits state regulation whereas the OSH Act does not, because the FTA only permits state regulation that is "not inconsistent with [its] provisions." 47 U.S.C. § 261(b). This is exactly the question facing this court: whether an alternative route to interconnection, bypassing the negotiation/arbitration of an interconnection agreement, is so inconsistent.

set out in § 252 presents competitors one option for achieving interconnection, it is not necessarily the *only* permissible process. Under this theory, Congress set out the negotiation/arbitration/approval/federal review process, not as the central method for market entry, but as one method. Therefore, state commissions, armed with the power granted them by 47 U.S.C. § 251(d)(3) to "establish access and interconnection obligations of local exchange carriers" and by 47 U.S.C. § 261(c) to impose "requirements on a telecommunications carrier for intrastate services that are necessary to further competition" as long as such obligations and requirements are consistent with the Act, would be free to devise alternative methods under which competitors could acquire services and network elements from incumbents.

In support of this reading, the MPSC points out that the FTA does not expressly state that the negotiation and arbitration of interconnection agreements is the *sole* method for competitors to gain access to incumbents' network elements and services. In this way, according to the MPSC, the present case is like the situation faced by the Supreme Court in *Verizon Communications Inc. v. FCC*, 152 L. Ed. 2d 701, 122 S. Ct. 1646 (2002) ("*FCC*"), wherein the Court held that the Act's requirement that incumbents provide network elements that may be bundled by competitors did not foreclose an FCC rule requiring incumbents to also combine elements at the competitors' request. In so holding, the Court wrote that "it takes a stretch to get from permissive statutory silence to a statutory right" for the incumbents, and the Court refused to read the Act's silence on any obligation or lack thereof on the part of incumbents to bundle elements as an affirmative statement that the imposition of any such obligation would be inconsistent with the Act. *Id.* at 1684. The MPSC would have this court hold similarly with respect to the interconnection agreement process contained in § 252 of the Act - that Congress's affirmative statement of that method was not intended to foreclose any alternative methods designed by state commissions.

The difference between the bundling obligation in *FCC* and the interconnection agreement process in the present case is that the detailed procedural scheme - including negotiation, arbitration, state commission approval, FCC oversight, and federal judicial review - set out in § 252 is central to the FTA in a way that a bundling requirement is not. One strong sign that the interconnection agreement process is central to the Act, and is therefore not to be evaded by state rule-making is the requirement of federal judicial review of state commission determinations. As explained above, § 252(e)(1) of the Act provides that all interconnection agreements must be reviewed, and approved or rejected, by the relevant state commission. After this review, § 252(e)(6) provides that any party aggrieved by the state commission's determination may appeal that determination in the federal district courts. Emphasizing the importance to Congress of this federal review, § 252(e)(4) states that "no state court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4). However, there is no provision for federal court review of state tariff orders. Therefore, aside from bringing a federal law preemption action pursuant to 28 U.S.C. § 1331 to challenge each tariff order, an incumbent aggrieved by a state commission tariff decision might not be able to seek federal review.

In asserting that the interconnection agreement process is not central to the Act, the MPSC proffers § 252(f) as an example of a situation in which competitors can acquire services from incumbents without engaging in the interconnection agreement process. However, the MPSC's reliance on this section is misplaced.[4]

---

[4] The MPSC comes closer with its reliance upon *Michigan Bell Telephone v. Strand*, 26 F. Supp. 2d 993, 1000 (W.D. Mich. 1998), to support the same proposition. In rejecting an incumbent's challenge to an MPSC order that altered existing interconnection agreements, the district court in that case held that the commission's actions in amending the existing agreements were permissible

Bell operating companies have long been prohibited from offering long distance telephone service; however, § 271 of the FTA permits these companies to enter the long distance market if they can demonstrate that they have opened their local exchanges to competition. The Bell companies can demonstrate that they have done so in one of two ways. They can enter into a qualifying interconnection agreement, 47 U.S.C. § 271(c)(1)(A), (c)(2)(B), or, in the event that no market competitors request such an agreement, they can file a qualifying "statement of the terms and conditions that the company generally offers to provide" with the relevant state commission. *Id.* at § 271. Section 252(f) provides the procedure under which the Bell companies may file, and the state commissions may review, these statements. As with the interconnection agreement process, § 252(e)(5) requires the FCC to review the statement if the state commission fails to do so. Also, again, as with the interconnection process, § 252(e)(6) provides for federal district court review of the state commission's determination.

According to the MPSC, competitors of Bell companies that have filed such statements may choose to purchase services directly from these statements, without first entering into an interconnection agreement with the incumbent; the MPSC contends that this proves that the interconnection agreement process is not central to the FTA. Verizon disputes this characterization, and contends that competitors still must

---

because, among other reasons, "the Section 252 negotiation procedure is not the sole means for the MPSC under the federal statutes to order and regulate telecommunications." *Id.* at 1000. The MPSC argues that this language provides support for the proposition that the §§ 251 and 252 process is not the sole process by which competitors can acquire services and network elements from incumbents. However, as the district court in the present case pointed out, the tariff in *Michigan Bell Telephone v. Strand* merely served to amend an existing interconnection agreement. *See Verizon North, Inc.*, 140 F. Supp. 2d at 809. The order at issue in that case did not completely displace the existing interconnection agreement between the parties or, as the MPSC order in the present case does, make unnecessary future interconnection agreements between other parties.

enter into an interconnection agreement in order to acquire the services; the competitor will simply be able to refer to the § 252(f) statement in seeking an agreement.

As an initial matter, nothing in the language of § 252(f) suggests that it provides an alternative route around the interconnection agreement process for competitors of Bell companies that have filed § 252(f) statements. More importantly, however, § 252(f) is not at issue in the present case, because Verizon is not a Bell operating company. Therefore, whether Congress intended the interconnection agreement process to be the sole method of interconnection for competitors of Bell companies that have filed § 252(f) statements is simply irrelevant to this case.

Moreover, contrary to the MPSC's contention, a review of § 252(f) actually illustrates why Michigan's tariff procedure is inconsistent with, and therefore preempted by, the Act. As mentioned above, the same subsections of § 252 provide the same carefully-designed review process for a § 252(f) statement as they do for an interconnection agreement - the statement is to be presented to the relevant state commission for approval, the FCC can step in to approve the statement if the state commission does not act, and the state commission's actions are subject to federal court review. As discussed above, Michigan's tariff procedure bypasses all of this procedure.

The proper focus for the preemption analysis in this case is on the § 252 process as a whole. The important point is not the narrow issue of negotiation/arbitration as the means for molding the business relationship between the incumbent and its competitors, but rather that the MPSC order provides an alternative route around the entire interconnection process (with its attendant negotiation/arbitration, state commission approval, FCC oversight, and federal court review procedures). The Tenth Circuit appears to have recognized this in a recent decision upholding a provision in an interconnection agreement under which a competitor could purchase services at

the rates and terms set forth in state tariffs filed by the incumbent in addition to purchasing them pursuant to the rates and terms set forth in its interconnection agreement with the incumbent. *See U.S. West Communications, Inc. v. Sprint Communications Co.*, 275 F.3d 1241 (10th Cir. 2002). The district court in that case had invalidated the provision as violative of the Act, because the competitor gained the terms and conditions outside of the negotiation/arbitration process set forth in § 252. *See id.* at 1249-50. The court of appeals, distinguishing the case before it from the district court decision in the present case, wrote that

> the challenged provision does not eliminate interconnection agreements, but rather is a part of one. A decision by [the competitor] to purchase services at the rates and terms set forth in one or more of [the incumbent's] tariffs does not result in abandonment of the interconnection agreement between itself and [the incumbent]. It simply means that the interconnection agreement is amended to include the terms of the particular tariff(s). The parties remain bound by the interconnection agreement at all times, as anticipated by the Act.

Id. at 1251. Further, the Tenth Circuit went on to allay the concern expressed by the district court in that case, that incorporation of a tariff provision would not provide a basis for federal court review, by noting that under that court's jurisprudence, "state commissions have inherent authority to interpret and enforce previously-approved interconnection agreements, and . . . federal courts have jurisdiction to review state commission decisions interpreting and enforcing previously-approved interconnection agreements." *Ibid.* Therefore, the fact that an interconnection agreement already existed between the parties was important to the validity of the state commission's plan.

The only other court that appears to have considered the specific question presented by this case also recognized the centrality of the § 252 process. An Oregon district court held that a state commission's tariff requirement conflicted with the FTA, because it would require incumbents to offer their services to competitors "via a procedure that bypasses the Act entirely and ignores the procedures and standards that Congress has established." *MCI Telecomms. Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1178 (D. Or. 1999)[5]. In so holding, that court pointed out that the state commission had not "merely adopted a short-form interconnection agreement, along with a list of resale and unbundled element prices that will be incorporated in those agreements. Rather, the [commission had] dispensed with the interconnection agreement altogether and [allowed competitors] to order services 'off the rack' without an interconnection agreement." *Ibid.* The Oregon district court held that designing an alternative system, under which competitors might acquire services and network elements from incumbents without engaging in the § 252 process, was impermissible under the FTA.

---

[5] The amici supporting reversal of the district court in this case direct this court's attention to *In re Public Utility Commission of Texas*, 13 F.C.C.R. 3460, ¶¶ 132-39 (1997), wherein the FCC upheld a Texas commission's rule permitting certain competitors to purchase services at a 5 discount to the rate listed in a tariff filed with the state. The amici cite the FCC decision as evidence that the FCC interprets the FTA to permit state commissions to implement tariff schemes that bypass the interconnection agreement provisions of the Act. *See* Brief of Amici Supporting Reversal at 22. According to the amici, this interpretation is entitled to substantial deference, pursuant to *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). However, while the FCC's discussion of the Texas rule may be read to suggest that the rule permitted competitors to acquire services from incumbents without first taking part in the interconnection agreement process, that fact is not discussed, relied upon, or even challenged in that case. Since this court can not tell from the FCC decision whether or not the Texas rule requires interconnection agreements, and since no party seems to have argued that any evasion of the interconnection agreement process violated the Act, this court can not rely upon *In re Public Utility Commission of Texas* as setting forth the FCC's position on the relevant issue in the present case.

We agree. The FTA permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets in America. Indeed, the Act makes clear that state commission regulations are not preempted as long as "such regulations are not inconsistent with the provisions of [the FTA]." 47 U.S.C. § 261(b). However, the MPSC tariff requirement is "inconsistent with the provisions of [the FTA]," and therefore invalid, because it completely ignores and bypasses the detailed process for interconnection set out by Congress in the FTA.

The Bundling Requirement

The second part of the MPSC order at issue in this case requires Verizon to offer "unbundled network elements as combinations or platforms" at competitors' request. MPSC Feb. 25, 1998 Order at 23, J.A. at 278. In invalidating that rule, the district court agreed with Verizon's contention that requiring incumbents to combine network elements for requesting competitors is inconsistent with the plain language of the Act, which requires incumbents to provide competitors access to network elements "in a manner that allows *requesting carriers* to combine such elements." 47 U.S.C. § 251(c)(3) (emphasis added). In so holding, the district court followed the Eighth Circuit's reasoning in *Iowa Utilities Board v. FCC*, 219 F.3d 744 (8th Cir. 2000). In that case, the Eighth Circuit held that a similar rule adopted by the FCC violated the plain language of § 251(c)(3) of the Act, which "unambiguously indicates that requesting carriers will combine the unbundled elements themselves." *See Iowa Utilities Bd.*, 219 F.3d at 759.

During the pendency of this appeal, the Supreme Court issued an opinion overturning the Eighth Circuit on this issue. As mentioned above, in *FCC*, 122 S. Ct. at 1684-87, the Court held that the FCC rule requiring incumbents to combine elements at competitors' request did not violate the plain language of the FTA. In relevant part, the Court wrote:

> If Congress had treated incumbents and entrants as equals, it probably would be plain enough that the incumbents' obligations stopped at furnishing an element that could be combined. The Act, however, proceeds on the understanding that incumbent monopolists and contending competitors are unequal, and within the actual statutory confines it is not self-evident that in obligating incumbents to furnish, Congress negated a duty to combine that is not inconsistent with the obligation to furnish, but not expressly mentioned. Thus, it takes a stretch to get from permissive statutory silence to a statutory right on the part of the incumbents to refuse to combine for a requesting carrier, say, that is unable to make the combination or may even be unaware that it needs to combine certain elements to provide a telecommunications service.

Id. at 1684 (citations omitted). The Supreme Court having foreclosed the reasoning upon which the district court based its invalidation of the MPSC's bundling requirement, we would ordinarily reverse the district court's holding.

However, Verizon argues that there is an alternative ground upon which this court should uphold the district court's invalidation of the MPSC bundling rule. Verizon points to the fact that in *FCC*, the Supreme Court specifically noted that under the FCC bundling requirement, competitors requesting bundling must pay "'a reasonable cost-based fee' for whatever the incumbent does" to combine elements. *FCC*, 122 S. Ct. at 1685 (quoting Brief for Petitioner Federal Parties in Nos. 00-587, etc. at 34). Verizon alleges that the MPSC rule at issue in the present case provides for no such compensation and is, therefore, distinguishable from the FCC rule upheld by the Supreme Court. The MPSC disagrees, contending that its rule

does provide Verizon compensation for the bundling work it requires.

Verizon raised the compensation issue before the district court. *See* Memorandum in Support of Verizon's Motion for Summary Judgment at 3. However, since the district court invalidated the MPSC rule as violating the plain language of the Act, it neither reached nor created a record regarding this more limited alternative argument. Therefore, this court lacks the factual basis upon which to consider this issue. Accordingly, we vacate the district court's holding with respect to this claim and remand the case for further consideration.

III

For the foregoing reasons, we AFFIRM in part and VACATE in part the district court's decision.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VERIZON NORTH, INCORPORATED,

Plaintiff,

File No. 5:98-CV-38

v.

HON. ROBERT HOLMES BELL

JOHN G. STRAND, Chairman;
JOHN C. SHEA, Commissioner, and
DAVID A. SVANDA, Commissioner
(In Their Official Capacities as
Commissioners of the Michigan Public
Service Commission),

Defendants.

Certified as a True Copy
Ronald C. Weston, Sr., C
By:_____
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date 12/06/00

OPINION

Verizon North Incorporated, formerly known as GTE North Incorporated ("Verizon") is an incumbent local telecommunications carrier in Michigan. In this action Verizon has sued John G. Strand, John C. Shea,[1] and David A. Svanda, Commissioners of the Michigan Public Service Commission ("MPSC"), seeking declaratory and injunctive relief from the February 25, 1998, order of the MPSC. Verizon contests two provisions of the order: the provision that Verizon offer network elements and services for sale through published tariffs, and the

---

[1] Although Plaintiff advises in its motion for summary judgment that John C. Shea has been replaced as commissioner by Robert B. Nelson, the Court has not received a motion or stipulation for the substitution of defendants.

provision that Verizon combine unbundled network elements for its competitors at their behest. Verizon brings this action under the Supremacy Clause, arguing that these provisions are in conflict with and are preempted by the Federal Telecommunications Act of 1996 (the "FTA" or the "Act"), Pub. L. No. 104-104, 56 Stat. 110 (codified in various sections of 47 U.S.C.). Verizon also brings a separate and independent claim that enforcement of the order infringes its statutory rights in violation of 42 U.S.C. § 1983. This matter is currently before the Court on Verizon's affirmative motion for summary judgment.[2]

I.

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. In evaluating a motion for summary judgment the Court must look beyond the pleadings and assess the proof to determine whether there is a genuine need for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). If the moving party carries its burden of showing there is an absence of evidence to support a claim then the non-moving party must demonstrate by affidavits, depositions, answers to interrogatories, and admissions on file, that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient to create a genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). The proper inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so

---

[2] This Court previously dismissed this case for lack of jurisdiction. On appeal the Sixth Circuit Court of Appeals reversed that ruling, upheld this Court's jurisdiction under 28 U.S.C. § 1331, and remanded the case for determination on the merits. *GTE North, Inc. v. Strand*, 209 F.3d 909, 923 (6th Cir. 2000).

one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

II.

Because the Court is limited by Article III, § 2 of the United States Constitution to the adjudication of actual cases or controversies, the Court's first consideration is whether this case is ripe for review.[3] *Dixie Fuel Co. v. Commissioner of Social Security,* 171 F.3d 1052, 1057 (6th Cir. 1999). The basic rationale of the ripeness doctrine "is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements." *Thomas v. Union Carbide Agricultural Products Co.* 473 U.S. 568, 580, 87 L. Ed. 2d 409, 105 S. Ct. 3325 (1985) (quoted in *National Rifle Ass'n of America v. Magaw,* 132 F.3d 272, 284 (6th Cir. 1997)). The ripeness inquiry requires the court to consider "whether the issues are fit for judicial decision as well as the hardship to the challenging party resulting from potential delay in obtaining judicial decision." *Dixie Fuel,* 171 F.3d at 1058 (citing *Thomas,* 473 U.S. at 581). *See also Kardules v. City of Columbus,* 95 F.3d 1335, 1344 (6th Cir. 1996). A case is "fit for judicial decision" where the issues raised are purely legal ones and where the agency rule or action giving rise to the controversy is final and not contingent upon future uncertainties or intervening agency action. *GTE North, Inc. v. Strand,* 209 F.3d 909, 923 n.7 (6th Cir. 2000) (citing *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149, 18 L. Ed. 2d 681, 87 S. Ct. 1507 (1967), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99, 51 L. Ed. 2d 192, 97 S. Ct. 980 (1977)).

Defendants contend this case is not ripe for decision because Verizon does not have on file any enforceable tariffs as directed by Case No. U-11281.

---

[3] The Sixth Circuit remanded this case for determination on the merits "if and when the district court finds [Verizon's] claims ripe for review." 209 F.3d at 923.

Defendants' assertion that there are no enforceable tariffs on file in Case No. U-11281, while technically correct, is factually irrelevant, as the lack of a tariff in Case No. U-11281 does not mean that there are no enforceable tariffs on file. Pursuant to the February 25, 1998, order in Case No. U-11281, Verizon was required to file a tariff. The tariffs Verizon filed under U-11281 were rejected by the MPSC. The MPSC has not required Verizon to submit corrected tariffs in Case No. U-11281. As Defendants themselves noted, the MPSC has "moved past" Case No. U-11281 and has conducted new cost proceedings in Case No. U-11832. The tariffs filed under the new cost proceedings implement the very same tariff filing requirement entered in Case No. U-11281, but are based upon updated cost studies. Verizon filed tariffs in Case No. U-11832 on August 2, 2000. Accordingly, there are enforceable tariffs on file that would currently enable a competitor to actually request access at the tariff rate.

The relevant inquiry in this case is "whether the ripeness inquiry demands that one of [Verizon's] competitors actually request access at the tariff rate before deciding the case, or whether the order itself gives rise to a justiciable claim because it imposes an immediate obligation on [Verizon] to sell network elements at predetermined rates." *GTE North,* 209 F.3d at 923 n.7.

Because Verizon is challenging the MPSC's authority under the FTA to require the filing of a tariff, this suit raises a purely legal issue. *Burlington N. R.R. Co. v. Surface Transp. Bd.*, 316 U.S. App. D.C. 103, 75 F.3d 685, 691 (D.C. Cir. 1996). The legal question presented is ripe for review because the filing of a tariff has "immediate effects on legal rights relating directly" to Verizon's primary conduct. *Id.* at 690. This is so because once filed, a tariff binds the filing party "with the force of law." *Id.* Thus, the order itself gives rise to a justiciable claim because it imposes an immediate obligation on Verizon to sell network elements at predetermined rates. The legal issue raised in this case would not be clarified by withholding review until a competitor actually requested access at the tariff rate and Verizon came into court requesting a temporary restraining order.

This case does not present an abstract disagreement. Because the Defendant's authority to order the tariff requirement presents a purely legal question and because the February 25, 1998, order imposes an immediate obligation to file a tariff that has a binding effect on Verizon, this Court is satisfied that this matter is ripe for review.

III.

The MPSC's February 25 order requires Verizon to submit tariffs setting forth "the rates, terms and conditions for [Verizon] to provide access to unbundled network elements and interconnection services." MPSC 2/25/98 Order at 9-10. Verizon seeks a declaration that the tariffing requirement violates the FTA because it by-passes the party-specific negotiation and arbitration process crafted by Congress as the means for implementing the duties imposed by the Act. Verizon contends that pursuant to the Supremacy Clause, the State law must yield to contrary federal law.

Congress passed the Telecommunications Act of 1996, Pub.L. No. 104-104, 56 Stat. 110 (codified in 47 U.S.C.), in an effort to promote competition in local telephone markets by ending regulated monopolies previously enjoyed by incumbent local exchange carriers ("LECs") such as Verizon. *GTE North*, 209 F.3d at 912. Under the FTA incumbent LECs are required to resell their telecommunications systems. 47 U.S.C. § 251(b)(1). This obligation is accomplished through the negotiation of interconnection agreements. If there is a request of interconnection, services, or network elements, "an incumbent local exchange carrier may negotiate and enter into a binding agreement." 47 U.S.C. § 252(a)(1). The incumbent LEC and the requesting telecommunications carrier have the duty to negotiate in good faith. 47 U.S.C. § 251(c)(1). If the parties are unable to negotiate an agreement, either party can petition for binding arbitration before the state commission under a set timetable. 47 U.S.C. § 252(b). The FTA sets the standards to be applied by the

state commissions during the compulsory arbitration proceedings. 47 U.S.C. § 252(c) & (d).

Defendants dispute Verizon's contention that negotiation and arbitration are required to satisfy the FTA. Unless the State law is inconsistent with the FTA or FCC regulations, states are free to impose their own requirements that foster competition. State commissions can impose their own rules "in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of [the FTA]." 47 U.S.C. § 261. State commissions can also impose additional requirements "that are necessary to further competition in the provisions of telephone exchange service or exchange access, so long as the State's requirements are not inconsistent with" the FTA or the FCC's regulations to implement the FTA. 47 U.S.C. § 261(b) & (c). The FTA provides that in prescribing and enforcing regulations to implement the FTA, the FCC shall not preclude enforcement of any regulation, order, or policy of a State commission establishing access and interconnection obligations, so long as the regulation, order or policy is consistent with the requirements of § 251, and does not substantially prevent implementation of the requirements and purposes of the FTA. 47 U.S.C. § 251(d)(3). The MPSC contends that its tariffing order is fully consistent with its authority as established by the Michigan Telecommunications Act and Michigan case law, that it fosters competition, and that it is not inconsistent with the FTA.

The issue for this Court's determination is whether the tariff requirement imposed by the February 25 order is merely an additional requirement imposed by the state that is necessary to further competition, or whether it is inconsistent with and preempted by the FTA.

The only court that has considered this issue ruled that a state public utility commission's tariff requirement conflicted with and was preempted by the Act to the extent the incumbent LEC was required to sell unbundled elements or finished services to a competitor that had not first entered into an interconnection

agreement with the incumbent LEC pursuant to the Act. *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157 (D. Ore. 1999).

In *MCI v. GTE* the court observed that although the FTA provides for the resale of network elements through interconnection agreements, the incumbent LEC is not entitled to separately negotiate different price terms with each competitive LEC. *Id.* at 1177. The state commission is not precluded from setting unbundled element prices and wholesale discounts for a particular incumbent LEC, and using those same prices and rates in all interconnection agreements involving that incumbent LEC. *Id.* The court noted that the FTA places on the state commission the burden of determining a just and reasonable rate for the interconnection of facilities and equipment and the wholesale rates of telecommunications services, 47 U.S.C. § 252(d), and requires the incumbent LEC to make available any interconnection, service or network element provided under an approved agreement to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement. 47 U.S.C. § 252(i). The incumbent LEC also has a duty not to impose discriminatory conditions or limitations on the resale of its telecommunications services. 47 U.S.C. § 251(b) & (c).

Nevertheless, despite the state commission's duty to set rates under the FTA, the court found the tariff requirement to conflict with the federal law.

> "The record reflects that the PUC [Public Utilities Commission] has not merely adopted a short-form interconnection agreement, along with a list of resale and unbundled element prices that will be incorporated in those agreements. Rather, the PUC has dispensed with the interconnection agreement altogether and is allowing [competitive LECs] to order services "off the rack" without an interconnection agreement."

41 F. Supp. 2d at 1178. "[T]he state has done more than simply enforce additional state requirements. It has required GTE to sell unbundled elements or services for resale, to [competitive LECs], via a procedure that bypasses the Act entirely and ignores the procedures and standards that Congress has established." *Id.*

The MPSC notes that this court previously upheld its right to impose tariffs in *Michigan Bell Telephone Co. v. Strand*, 26 F. Supp. 2d 993 (W.D. Mich. 1998) (Enslen, C.J.). In *Michigan Bell* Judge Enslen noted that the § 252 negotiation procedure is not the sole means for the MPSC under the federal regulations to order and regulate telecommunications and held that tariffs are permissible as consistent state regulation approved the use of tariffs. *Id.* at 1000-01.

The ruling in *Michigan Bell* is not broad enough to cover the tariff at issue in this case. The tariff approved in *Michigan Bell* did not replace a negotiated interconnection agreement. The tariff merely operated to amend the interconnection agreement by replacing the shared transport tariffs with common transport tariffs. This amendment did not substantially prevent implementation of the FTA.

In contrast to the tariff approved in *Michigan Bell*, the tariff at issue in this case, like the tariff in *MCI v. GTE, supra,* completely displaces the interconnection agreement. The MPSC's order requires Verizon to file tariffs offering its network elements and services for sale on fixed terms to all potential entrants without the necessity of negotiating an interconnection agreement.

Defendants contend that the FTA does not displace any state law that furthers competition in local telephone markets, and that because their February 25 order is designed to further competition, it is not preempted by the FTA. Defendants oversimplify the preemption analysis. Even if the ultimate goal of the state law is to achieve the same goal of furthering competition that the FTA is designed to achieve, the state order may nevertheless be preempted "if it interferes with the methods by

which the federal statute was designed to reach that goal." *Gade v. National Solid Wastes Management Ass'n,* 505 U.S. 88, 103, 120 L. Ed. 2d 73, 112 S. Ct. 2374 (1992).

The FTA sets forth with some degree of detail the negotiation and arbitration process, leading to an interconnection agreement, by which the statutory goals are to be met. The Act specifies the timetable for negotiation and for petitioning for arbitration, § 252(b)(1); restricts the issues to be considered at arbitration, § 252(b)(4)(A); establishes standards to be applied at arbitration, 47 U.S.C. §§ 252(c) & (d); sets a timetable for approving agreements adopted by negotiation or arbitration, § 252(e)(4); and provides for exclusive review in federal court. §§ 252(e)(4) & (6).

Such specificity indicates that the negotiation and arbitration process plays an integral role in achieving Congress's goals of enhancing competition. Congress designed a deregulatory process that would rely in the first instance on private negotiations to set the terms for implementing new duties under the Act. In contrast to the private, party-specific negotiation and arbitration system created by Congress, the process for sale of network elements required by the MPSC's Order is a public rule of general application. By requiring Verizon to file public tariffs offering its network elements at wholesale services for sale to any party, the MPSC's Order improperly permits an entrant to purchase Verizon's network elements and finished services from a set menu without ever entering into the process to negotiate and arbitrate an interconnection agreement. It thus evades the exclusive process required by the 1996 Act, and effectively elirninates any incentive to engage in private negotiation, which is the centerpiece of the Act. Accordingly, the Court finds that the tariff requirement in the February 25 order is inconsistent with and preempted by the FTA.

IV.

The February 25 order requires Verizon to "offer unbundled network elements as combinations or platforms" at the

request of entrants. MPSC 2/25/98 Order at 23. Verizon contends that to the extent the Order requires Verizon to act at the request of new entrants to assemble new combinations of elements that do not already exist, it violates the plain language of § 251(c)(3).

The FTA requires incumbent LECs to "provide such unbundled network elements in a manner that allows *requesting carriers to combine* such elements in order to provide such telecommunications service." 47 U.S.C. § 251(c)(3) (emphasis added). Verizon does not dispute that where the elements are already combined, and the requesting carrier seeks access to them in that combined form, the incumbent cannot separate them. However, Verizon does contest the requirement that it combine unbundled elements at the request of its competitors.

This issue was addressed in *Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753 (8th Cir. 1997) *("Iowa Utilities I"), aff'd in part, rev'd in part sub nom AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999). In *Iowa Utilities I* the Eighth Circuit struck down an FCC Rule, 47 C.F.R. § 51.315(c)-(f), that required incumbents to combine network elements for competitors. "While the Act requires incumbent LECs to provide elements in a manner that enables the competing carriers to combine them, unlike the Commission, we do not believe that this language can be read to levy a duty on the incumbent LECs to do the actual combining of elements." 120 F.3d at 813.

On remand the Eighth Circuit reaffirmed its previous ruling vacating the combination rule because it violates the FTA. *Iowa Utils. Bd. v. F.C.C.*, 219 F.3d 744 (8th Cir. July 18, 2000) ("*Iowa Utilities II*").

> Here, Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall "combine such elements." It is not the duty of the [incumbent LECs] to "perform the functions necessary to combine unbundled network elements

> in any manner" as required by the FCC's rule. See 47 C.F.R. § 51.315(c). We reiterate what we said in our prior opinion: "[T]he Act does not require the incumbent LECs to do all the work." *Iowa Utils. Bd.*, 120 F.3d at 813.

Iowa Utilities II, 219 F.3d at 759. The court reasoned that the Act's plain language requiring incumbent LECs to "'provide such unbundled network elements in a manner that allows *requesting carriers to combine* such elements in order to provide such telecommunications service' . . . unambiguously indicates that requesting carriers will combine the unbundled elements themselves." *Id.* (emphasis in original). Requiring incumbents to combine network elements for competitors "cannot be squared with the terms of subsection 251(c)(3)." *Id.*

Defendants rely on *Southwestern Bell Telephone Co. v. Waller Creek Communications, Inc.*, 221 F.3d 812, 821 (5th Cir. 2000), in support of their assertion that the Eighth Circuit decision does not prohibit the combination of unbundled network elements, but rather only holds that combinations are not required by the FTA. The discussion in *Southwestern Bell* regarding *Iowa Utilities* and combinations of network elements is found only in dicta. More importantly, it involves a mistaken interpretation of *Iowa Utilities I*. In *Iowa Utilities II* the Eighth Circuit clarified that the rule requiring the incumbent to combine elements must remain vacated because it violated the FTA. 219 F.3d at 759.

Where the network elements are not already combined in the incumbent's network, Congress made clear that the incumbent's only duty was to provide elements in "a manner that allows requesting carriers to combine such elements." § 251(c)(3). Under the FTA it is the duty of the requesting carriers, not the incumbent LECs, to combine the elements. *Iowa Utilities II* makes it clear that the FCC cannot insert a bundling requirement consistent with the terms of the FTA. For the same reasons the state is also precluded from imposing such a requirement. Accordingly, the Court finds that the MPSC's order that Verizon

provide bundling at the behest of competitive LECs conflicts with and is preempted by the FTA.

V.

As a separate and independent basis for relief, Verizon contends that both of the alleged violations of the 1996 Act are also actionable under 42 U.S.C. § 1983.

Section 1983 imposes liability on anyone who, under color of state law, deprives a person "of any rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Although this case involves the alleged preemption of state law by federal law, the Supreme Court noted in *Golden State Transit v. Los Angeles,* 493 U.S. 103, 107 L. Ed. 2d 420, 110 S. Ct. 444 (1989), that it would be "incorrect to assume that a federal right of action pursuant to § 1983 exists every time a federal rule of law pre-empts state regulatory authority." *Id.* at 108. In order to seek redress through § 1983, "a plaintiff must assert the violation of a federal *right*, not merely a violation of federal *law." Blessing v. Freestone*, 520 U.S. 329, 340, 137 L. Ed. 2d 569, 117 S. Ct. 1353 (1997) (emphasis in original). In determining whether a particular statutory provision gives rise to a federal right the court considers the following three factors:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States.

Id. at 340-41 (citations omitted). Once it is established that a statute creates an individual federal right, there is a rebuttable presumption that the right is enforceable under § 1983. *Id.* at 341. That presumption will be rebutted if Congress specifically

foreclosed a remedy under § 1983 either expressly, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983. *Id.*

Verizon contends that its FTA claim meets the *Blessing* test, and properly states a claim under § 1983.

This Court disagrees. No evidence has been presented that the FTA's provisions regarding negotiation and bundling were designed to benefit the Plaintiff or incumbent LECs generally. Congress enacted the FTA to foster competition in local telephone service. *See GTE North,* 209 F.3d at 913; *GTE Northwest, Inc. v. Hamilton*, 971 F. Supp. 1350, 1352 (D. Or. 1997); *GTE Northwest, Inc. v. Nelson*, 969 F. Supp. 654, 656 (W.D. Wash. 1997). The intended beneficiaries of the Act are new entrants into the local telecommunications market. Where courts have concluded that the FTA provides a federal right to telecommunications companies, the finding has been in support of prospective entrants into the telecommunications market. *See, e.g. Cablevision of Boston, Inc. v. Public Imp. Com'n of City of Boston,* 38 F. Supp. 2d 46, 54 (D.Mass. 1999); (Congress intended FTA generally to benefit new entrants to the telecommunications business); *MCI Telecommunications Corp. v. Southern New England Telephone Co.*, 27 F. Supp. 2d 326, 333 (D. Conn. 1998); *National Telecommunication Advisors, Inc. v. City of Chicopee*, 16 F. Supp. 2d 117, 121 (D. Mass. 1998). Plaintiff is not a prospective entrant into the telecommunications market, and is not an intended beneficiary of the FTA.

Even in *AT&T Wireless PCS, Inc. v. City of Atlanta,* 210 F.3d 1322, 1329-30 (11th Cir. 2000), *vacated on other grounds*, 223 F.3d 1324, 2000 WL 1210663 (11th Cir. 2000), cited by Plaintiff, where the Eleventh Circuit permitted a § 1983 action to enforce right under the FTA, AT&T was a prospective entrant, not an incumbent, in the personal wireless services market in Atlanta. Moreover, *AT&T Wireless* is distinguishable because it involved the city council's denial of a permit request without either a written

denial or a written record. As such, the case implicated a due process right. No such individual right is involved in this case.

As noted in *Omnipoint Communications Enterprises, L.P. v. Newtown Tp.*, 219 F.3d 240, 245 (3rd Cir. 2000), a claim under § 1983 could benefit a plaintiff greatly, primarily because the Civil Rights Act could potentially provide the plaintiff with an additional remedy, the recovery of attorney's fees, otherwise not available under the Telecommunications Act. Other courts have noted that "[t]he § 1983 statutory apparatus adds *nothing* to plaintiff's remedial armament under the TCA -- except the opportunity to seek attorney's fees under § 1988 . . . While the desire to recoup fees is understandable, the use of § 1983 in such a way trivializes this important statute and is inconsistent with its intent." *Omnipoint Communications, Inc. v. Penn Forest Township,* 42 F. Supp. 2d 493, 506 (M.D. Penn. 1999) (quoting with approval *National Telecommunication Advisors, Inc. v. City of Chicopee,* 16 F. Supp. 2d 117, 120 (D. Mass. 1998) (emphasis in original)). Similarly, in this case the substantive elements of Plaintiff's § 1983 claim are precisely the same as its preemption claim. The desire for attorney fees appears to be the only purpose for Plaintiff's § 1983 claim.

The Court finds that Plaintiff has not stated a claim under § 1983. Plaintiff's request for declaratory relief under § 1983 will accordingly be denied.

VI.

Verizon contends that in addition to a declaration that the MPSC's order is preempted by federal law, Verizon is entitled to injunctive relief because it faces the threat of irreparable harm. Verizon contends that the tariffing and bundling requirements will result in Verizon losing competitive position. Competitive injuries resulting from the loss of fair competition is a form of irreparable harm that may warrant an injunction. *See Basicomputer Corp. v. Scott,* 973 F.2d 507, 512 (6th Cir. 1992). Injunctive relief was granted in *Illinois Bell Telephone Co. v. MCI Telecomms. Corp.*,

1996 U.S. Dist. LEXIS 18337, 1996 WL 717466, at *9 (N.D. Ill. Dec. 9, 1996), for unfair advantage in the local phone market. The court held that "loss of market share . . . is irreparable injury" because it would be difficult for an incumbent to regain market share once lost. *Id.*

Notwithstanding the case law support for injunctive relief, Plaintiff has presented no evidence from which this Court could infer that Defendants will not follow federal law as declared by this Court. This Court finding no cause for entering injunctive relief, Verizon's request for injunctive relief will accordingly be denied.

An order and declaratory judgment consistent with this opinion will be entered.

Date: _____

_____
ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

VERIZON NORTH, INCORPORATED,

Plaintiff,

File No. 5:98-CV-38

v.

HON. ROBERT HOLMES BELL

JOHN G. STRAND, Chairman;
JOHN C. SHEA, Commissioner, and
DAVID A. SVANDA, Commissioner
(In Their Official Capacities as
Commissioners of the Michigan Public
Service Commission),

Defendants.

---/

ORDER AND DECLARATORY JUDGMENT

In accordance with the opinion entered this date,

IT IS HEREBY ORDERED that Plaintiff Verizon North Incorporated's motion for summary judgment (Docket # 35) is **GRANTED IN PART and DENIED IN PART.**

IT IS FURTHER ORDERED that a **DECLARATORY JUDGMENT** is entered in favor of Plaintiff Verizon, declaring that the tariffing and bundling requirements of the MPSC's February 25, 1998, order are in conflict with and are preempted by the Federal Telecommunications Act.

IT IS FURTHER ORDERED that Verizon's request for a declaration that the tariffing and bundling requirements of the

MPSC's February 25, 1998, order is actionable under 42 U.S.C. § 1983 is **DENIED.**

IT IS FURTHER ORDERED that Verizon's request for injunctive relief is **DENIED.**

Date:_____

_____

ROBERT HOLMES BELL
UNITED STATES DISTRICT JUDGE

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
GENERAL PROVISIONS

§ 153. Definitions

For the purposes of this Act, unless the context otherwise requires—

* * *

(29) Network element. The term "network element" means a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service.

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER II--COMMON CARRIERS
PART II--DEVELOPMENT OF COMPETITIVE MARKETS

§ 251. Interconnection

(a) General duty of telecommunications carriers

Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.

(b) Obligations of all local exchange carriers

Each local exchange carrier has the following duties:

(1) Resale

The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) Unbundled access

The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale

The duty—

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes

The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation

The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation

(1) In general

Within 6 months after February 8, 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards

In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations

In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration

(1) Commission authority and jurisdiction

The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs

The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(f) Exemptions, suspensions, and modifications

(1) Exemption for certain rural telephone companies

(A) Exemption

Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule

The party making a bona fide request of a rural telephone company for interconnection, services, or network

elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption

The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) of this section, from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on February 8, 1996.

(2) Suspensions and modifications for rural carriers

A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements

On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996 and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier

(1) Definition

For purposes of this section, the term 'incumbent local exchange carrier' means, with respect to an area, the local exchange carrier that--

(A) on February 8, 1996, provided telephone exchange service in such area; and

(B)(i) on February 8, 1996, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (> 47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if--

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision

Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201 of this title.

TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5--WIRE OR RADIO COMMUNICATION
SUBCHAPTER II--COMMON CARRIERS
PART II--DEVELOPMENT OF COMPETITIVE MARKETS

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation

(1) Voluntary negotiations

Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation

Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration

(1) Arbitration

During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond

A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate

The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration

In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;

(2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section--

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic

(A) In general

For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5) of this title, a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction

This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services

For the purposes of section 251(c)(4) of this title, a State commission shall determine wholesale rates on the basis of retail rates charges to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission

(1) Approval required

Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection

The State commission may only reject

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) of this section if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) of this section if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority

Notwithstanding paragraph (2), but subject to section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision

If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a) of this section, or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b) of this section, the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

(f) Statements of generally available terms

(1) In general

A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

(2) State commission review

A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 of this title and the regulations thereunder. Except as provided in section 253 of this title, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review

The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review

Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected

The submission or approval of a statement under this subsection shall not relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251 of this title.

(g) Consolidation of State proceedings

Where not inconsistent with the requirements of this chapter, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), and 253 of this title, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this chapter.

(h) Filing required

A State commission shall make a copy of each agreement approved under subsection (e) of this section and each statement approved under subsection (f) of this section available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier

For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h) of this title.

TITLE 47. TELEGRAPH, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
PART II—DEVELOPMENT OF COMPETITIVE MARKETS

§ 261. Effect on other requirements

(a) Commission regulations.

Nothing in this part [47 USCS §§ 251 et seq.] shall be construed to prohibit the Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996] in fulfilling the requirements of this part [47 USCS §§ 251 et seq.], to the extent that such regulations are not inconsistent with the provisions of this part [47 USCS §§ 251 et seq.].

(b) Existing State regulations.

Nothing in this part [47 USCS §§ 251 et seq.] shall be construed to prohibit any State commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications Act of 1996 [enacted Feb. 8, 1996], or from prescribing regulations after such date of enactment, in fulfilling the requirements of this part [47 USCS §§ 251 et seq.], if such regulations are not inconsistent with the provisions of this part [47 USCS §§ 251 et seq.].

(c) Additional State requirements.

Nothing in this part [47 USCS §§ 251 et seq.] precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part [47 USCS §§ 251 et seq.] or the

Commission's regulations to implement this part [47 USCS §§ 251 et seq.].

STATE OF MICHIGAN

COURT OF APPEALS

GTE NORTH, INC.,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, MICHIGAN CABLE TELECOMMUNICATION ASSOCIATION, MCI TELECOMMUNICATIONS, ATTORNEY GENERAL, AT & T COMMUNICATIONS, TCG DETROIT, INC, AND AMERITECH MICHIGAN,

Appellees.

UNPUBLISHED
December 30, 1997

No. 198324
Public Service Commission

LC No. U-00010860

Before: Jansen, P.J., and Doctoroff and Gage, JJ.

PER CURIAM.

Plaintiff GTE North (GTE) appeals from a June 5, 1996, order of the Michigan Public Service Commission (PSC) and the PSC's September 12, 1996, order on rehearing. As described by the PSC, this PSC case concerns "interconnection issues generic to basic local exchange service competition" under the Michigan Telecommunications Act (MTA). MCL

484.2101 *et seq.*; MSA 22.1469(101) *et seq.* We reject GTE's arguments that the PSC decision resulted in an unconstitutional taking of GTE's property and we affirm.

GTE is in the business of providing "basic local exchange service" in parts of Michigan. See MCL 484.2102(B); MSA 22.1469(102)(a). GTE has been a regulated, monopoly provider of such service for many years and has a considerable investment in facilities and information.

Our Legislature has made a policy decision to deregulate telephone services and to introduce competition into telephone services. This policy is reflected in the MTA. 1991 PA 179, effective January 1, 1992, and 1995 PA 216, effective November 30, 1995. Providers of basic local exchange service such as GTE are required to "unbundle" and to price separately each basic local exchange service they provide and other providers must be allowed to purchase the services. MCL 484.2355; MSA 22.1469(355), MCL 484.2357(1); MSA 22.1469(357)(1). The rate a provider of basic local exchange service can charge for interconnecting with its service is the provider's "total service long run incremental cost" (TSLRIC) of providing the service, at least until January 1, 1997. MCL 484.2352(1); MSA 22.1469(352)(1). Until studies regarding TSLRIC costs are approved by the PSC, the rates for "unbundled loops" and certain other services are to be those established pursuant to PSC case U-10647. MCL 484.2352(2); MSA 22.1469(352)(2). After January 1, 1997, the rate for interconnection shall be "just and reasonable" as determined by the PSC. Providers of local exchange service are to file tariffs with the PSC which set forth their wholesale rates, and such rates must be at levels no greater than the provider's current retail rate less the provider's avoided costs. MCL 484.2357(4); MSA 22.1469(357)(4). Thus, our Legislature has addressed some of the specifics of pricing during and after deregulation. Doing so was well within the Legislature's authority. *Duquesne Light Co v Barasch*, 488 US 299, 313; 109 S Ct 609; 102 L Ed 2d 646 (1989).

PSC Case U-10647 established interconnection arrangements between City Signal, Inc., and Ameritech Michigan, a provider of basic local exchange service. GTE participated in U-10647, but it was not GTE's rates that were specifically being established in that case. U-10647 gave rise to the instant proceeding, however. In U-10647 the PSC determined that a "generic" proceeding should be undertaken to consider interconnection issues relating to basic local exchange service competition. The instant case was therefore initiated by an order of the PSC entered in U-10647. Numerous parties participated by providing prepared testimony, exhibits and briefs.

Three paragraphs of the order portion of the PSC's June 5, 1996, decision in the instant case are relevant to this appeal.

> A. Ameritech Michigan and GTE North Incorporated shall, within 60 days of the date of this order, file new total service long run incremental cost studies as provided in this order. Until those cost studies are approved by the Commission, the rates established by the Commission in Case No. U-10647 shall remain in effect.
>
> B. Ameritech Michigan and GTE North Incorporated shall, within 30 days of the date of this order, file a tariff for unbundled ports, at a rate equal to the total service long run incremental cost for that service, and a total service long run incremental cost study to support that rate.
>
> * * *
>
> D. Within 30 days of the date of this order, Ameritech Michigan and GTE North

> Incorporated shall file tariffs for resale of all basic local exchange services that, as of January 1, 1996, these companies provided to retail customers. The required tariffs shall reflect wholesale rates as defined by law.

On rehearing, the PSC rejected GTE's contention that rates based upon GTE's TSLRIC for unbundled loops (and other services) would be at a confiscatory rate because, according to GTE, TSLRIC did not include overhead or a profit factor. The PSC found that interconnection rates set at TSLRIC were not confiscatory and that such rates allowed GTE to recover its costs of providing the network. The PSC also found that the methodology for determining TSLRIC included a profit.

The PSC rejected GTE's argument that GTE would be forced to sell its basic local exchange services below its costs. GTE argued that certain of its retail services were already priced at a subsidized rate which was less than GTE's actual costs, and that a wholesale rate would be even farther below GTE's actual costs. The PSC recognized that GTE was permitted to restructure its rates for basic local exchange service in order to ensure that they were not less than TSLRIC. MCL 484.2304a; MSA 24.1469(304a).

Subsequent to the instant proceeding PSC case U-11281 was initiated. The purpose of U- 11281 is to consider GTE's TSLRIC and to determine prices for unbundled network elements as well as for basic local exchange services. That is, the actual rates GTE is permitted to charge are the subject of U-11281.

In this appeal GTE claims that there has been an unconstitutional taking of its property under either a "regulatory takings" analysis or a "physical occupation" analysis. GTE contends that the PSC's orders establish pricing methods that will require GTE to accommodate competitors at

unfairly low prices which will not ensure GTE an opportunity to earn a fair return on its investment. GTE also argues that there has been a "taking" because actual physical interference and occupation of GTE's property has been ordered by the PSC.

The PSC's orders are subject to review as provided in MCL 462.26; MSA 22.45. MCL 484.2203(7); MSA 22.1469(203)(7) [previously MCL 484.2203(5); MSA 22.1469(203)(5)]. It is GTE's burden as appellant to show by clear and satisfactory evidence that the challenged order of the PSC is unlawful or unreasonable. MCL 462.26(8); MSA 22.45(8); *Michigan Intra-State Motor Tariff Bureau, Inc v PSC*, 200 Mich App 381, 387; 504 NW2d 677 (1993). All rates, fares, charges, classifications, regulations, practices and services prescribed by the PSC are presumed prima facie to be lawful and reasonable. MCL 462.25; MSA 22.44; *Michigan Consolidated Gas Company v PSC*, 389 Mich 624; 209 NW2d 210 (1973). "Unlawful" has been defined as an erroneous interpretation of applicable law, while "unreasonable" has been defined as unsupported by the evidence. *Associated Truck Lines, Inc v PSC*, 377 Mich 259, 279; 140 NW2d 515 (1966) (J. O'Hara dissenting on other grounds). Const 1963, art 6, §28 requires that a final agency order be authorized by law and supported by competent, material and substantial evidence on the whole record. *Attorney General v PSC*, 189 Mich App 138, 142; 472 NW2d 53 (1991). This Court gives due deference to the PSC's administrative expertise and will not substitute its judgment for that of the PSC, particularly in legislative matters such as setting rates. *Michigan Intra-State Motor Tariff Bureau, Inc, supra* at 388.

Private property may not be taken for public use without just compensation. US Const Am V and XIV; Const 1963, art 10, §2. GTE's claims of an unconstitutional taking are either premature or are not ripe. A claim of unconstitutional regulatory taking does not ripen until there has been a final decision regarding application of the law to the property

involved. *Electro-Tech, Inc v H.F. Campbell Co*, 433 Mich 57, 79; 445 NW2d 61 (1989); *Lake Angelo Assoc v Twp of White Lake*, 198 Mich -4- App 65, 70-71; 498 NW2d 1 (1993). Although these cases dealt with building and zoning restrictions, the underlying principle – that there is no adjudicable damage until the regulatory process is complete – conceptually applies equally in the instant context.

GTE's rates for basic local exchange service and for interconnections are being established in U-11281. In the instant case the PSC basically established a framework for a future determination of GTE's rates to be charged under §§352 and 357, as well as for other rates. The two orders which the PSC issued follow the basic mandate prescribed by our Legislature in the MTA. Although rates for "unbundled loops" might actually be fixed pursuant to the determination in U-10647 (pursuant to §352(2)), there is no indication that such interim rates have yet been the basis for any resale of services, and, due to their interim nature, there might never be a resale under those rates. Moreover, our understanding (based particularly on the opinions of the PSC and the PSC's brief filed on appeal) is that U-10647 established a framework for interim rates, which rates would then be based upon GTE's own costs. Under these circumstances we abstain from ruling on the constitutionality of the PSC's application of MCL 484.2352; MSA 22.1469(352) and MCL 484.2357; MSA 22.1469(357) to GTE. Courts should not "grapple with a constitutional issue except as a last resort." *Taylor v Auditor General*, 360 Mich 146, 152; 103 NW2d 769 (1960). See also *Regents of the University of Michigan v Michigan*, 395 Mich 52, 59; 235 NW2d 1 (1975).

We recognize that there is a wide range of permissible rates which do not constitute a taking. A rate order is unconstitutional when it establishes a rate so low as to be confiscatory. *Michigan Bell Telephone Co v Public Service Comm*, 332 Mich 7, 26; 50 NW2d 826 (1952). No particular method or formula must be followed by the PSC when it

determines rates. *Id.* at 36. A fundamental difficulty with GTE's position on appeal is that GTE has not shown that the rates it will be permitted to charge are confiscatory in the sense that they will not provide GTE with a return on its investment or will be less than its costs. These possibilities would be matters for consideration in the subsequent proceeding initiated to determine GTE's actual rates. But in the instant case what is known is that GTE's rates are to be based upon TSLRIC and the PSC has indicated that the methodology for determining TSLRIC includes an element of profit.

GTE has not shown that its rates are necessarily limited to something less than its costs. Although included in GTE's submitted evidence were answers to two questions which indicated GTE would not recover its full costs, the issue was not developed and no findings regarding specific costs were made by the PSC. This was consistent with the PSC's approach in this "generic" proceeding which merely ordered GTE to provide studies and propose tariffs which would then be the subject of a further proceeding. In addition, GTE is not necessarily locked into rates below its actual costs, since GTE may seek to restructure its rates pursuant to MCL 484.2304a; MSA 22.1469(304a).

In support of its "regulatory taking" argument, GTE relies on *Brooks-Scanlon Co v RR Comm of Louisiana*, 251 US 369; 40 S Ct 183; 64 L Ed 323 (1920). *Brooks-Scanlon* is inapplicable. *Brooks-Scanlon* involved a lumber company which operated a railroad line as part of its business. The railroad line became unprofitable. The Supreme Court reversed the state supreme court's ruling that Brooks-Scanlon could be required to continue operating the railroad line even though it was operating at a loss. The Supreme Court ruled that the nonpublic lumber business could not be forced to subsidize -5- the public railroad line. The instant case is materially different because GTE is largely or entirely a regulated business in which the public has a significant interest, as evidenced by our Legislature's passage of the MTA. *Brooks-Scanlon* might be

applicable if GTE were seeking to terminate its telecommunication business in Michigan.

Bohn Lumber Products v Michigan Public Service Comm, 317 Mich 174; 26 NW2d 875 (1947), which GTE also relies upon, is similarly distinguishable. Bohn involved another private lumber company which leased property from a railroad for use in the lumber company's private business. *Bohn* could not prevent the railroad company from subsequently leasing the property to another private company. While the *Bohn* Court recognized that a regulated entity could not be deprived of its property without due process and that the right to regulate does not include the right to take property for the private use of another, *Bohn* further recognized that where a duty to the public is not involved the police power of the state is not to be exercised. *Id.* at 181-183. The lease decision in *Bohn* was not a regulated matter since the property involved was not "public service property" devoted to common carrier service. *Id.* at 184. In contrast, the instant case involves public access to telephone service and to GTE's property which is devoted to a public service.

GTE's reliance upon *Loretto v Teleprompter Manhattan CATV Corp*, 458 US 419; 102 S Ct 3164; 73 L Ed 2d 868 (1982), is also misplaced. GTE relies upon this case to support its argument that an unconstitutional taking has occurred by way of "physical occupation." *Loretto* dealt with a requirement that private landlords allow cable television companies to attach their facilities to the property of the landlords. GTE is not situated similarly to the landlord in *Loretto* because GTE's property is used for the public and regulated purpose of providing telephone communications. Under the MTA, GTE is required to permit – for a price – other providers to interconnect with GTE's equipment and facilities. For example, under MCL 484.2356; MSA 22.1469(356), GTE is required to provide for "virtual collocation" with other providers at or near the location of GTE's transmission

equipment. These requirements for interconnection do not constitute an unconstitutional taking.

Michigan regulatory acts have long required regulated companies to connect their equipment and services with those of other providers. See 1883 PA 72 and 1913 PA 206; MCL 484.51; 22.1431 and MCL 484.106. This interference with a utility's private property is not unconstitutional, since the utility is a regulated entity, the property is used for a public purpose, the interference is reasonable, and just compensation is provided in the utility's rates. Such was the reasoning in *Michigan State Telephone Co v Michigan RR Comm*, 193 Mich 515; 161 NW 204 (1916). Also pertinent to the instant case is that the Court in *Michigan State Telephone Co* recognized that insufficient information was available to it on the question of whether the utility's rates were sufficient to avoid a loss. The Court left the matter for the ratemaking authority, noting that it was the utility's obligation to affirmatively show that the interconnection ordered would cause an undue loss. This is similar to the case before us in that GTE has an opportunity to establish in a subsequent proceeding that it will be forced to operate at a loss.

GTE has not shown an unconstitutional taking or a confiscatory rate, and therefore GTE has not shown that the PSC's orders were unlawful or unreasonable.

Affirmed.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Hilda R. Gage